

No. 16032 ✓

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, Appellant,

vs.

FERNANDO S. FORFARI,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Northern Division

FILED

NOV 14 1958

PAUL P. O'BRIEN, CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer to Complaint.....	7
Appeal:	
Certificates of Clerk to Transcript of Record on	20, 122
Designation of Additional Record on (Appellee's-USCA)	125
Notice of	19
Statement of Points and Designation of Record on (Appellant's-USCA).....	123
Certificate of Clerk to Supplemental Transcript of Record	122
Certificate of Clerk to Transcript of Record...	20
Complaint	3
Designation of Additional Record (Appellee's-USCA)	125
Designation of Record on Appeal (Appellant's-USCA)	124
Findings of Fact and Conclusions of Law.....	14
Judgment	17

ii.

Memorandum and Order:

Filed August 2, 1957.....	10
Filed December 31, 1957.....	13
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	19
Statement of Points and Designation of Record (Appellant's-USCA)	123
Transcript of Proceedings and Testimony.....	21

Witnesses for Plaintiff:

Forfari, Fernando S.

—direct	24
—cross	36
—recalled, direct	107
—cross	115
—redirect	117

Silbermann, Dr. Colman

—direct	82
—cross	96

Witnesses for Defendant:

Hall, Will

—direct	57
—cross	60

Patmon, Frank

—direct	65
—cross	74

Sexson, Dale

—direct	43
—cross	50

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In the District Court of the United States, Northern District of California, Northern Division

No. 6772

FERNANDO S. FORFARI, Plaintiff,

vs.

UNITED STATES OF AMERICA, FIRST DOE,
SECOND DOE, FIRST CORPORATION, a
corporation, Defendants.

COMPLAINT FOR DAMAGES

Plaintiff for his complaint and cause of action against the Defendants herein, respectfully represents to the Court and alleges as follows:

I.

That Plaintiff resides in the City of Vallejo, County of Solano, State of California, the same being within the Northern Division, Northern District of California, in the District Court of the United States;

II.

Plaintiff brings this action against the Defendant United States of America pursuant to the provisions of the Federal Tort Claims Act, Public Law 601, 9th Congress, Title IV, as amended, (Title 28, U.S.C.A. Sections 921 et seq.), as amended, hereinafter called the act, and is demanding Fifteen thousand (\$15,000.00) Dollars in damages for personal injuries and loss of property;

III.

That First Doe, Second Doe and First Corporation, a corporation, are sued herein by fictitious names for the reason that their true names are to the Plaintiff unknown, and when their true names are ascertained, the Plaintiff will ask leave of the Court to substitute their true names for the said fictitious names, together with the appropriate charging allegations;

IV.

That at all times hereinmentioned the United States Navy is a Governmental Agency, acting for and in behalf of Defendant United States of America herein; that the aforesaid United States Navy, its agents, servants and employees, in conjunction with its other facilities, maintained, controlled and operated for and in behalf of said Defendant, a Commissioned Officers Mess, at Mare Island Naval Shipyard, Mare Island, State of California, and provided therein a certain stairway from the kitchen to the wash room, used in connection therewith for the use, and so intended the use, and convenience of the tenants, their employees and the general public, and was so used by them;

V.

That on or about the 21st day of November 1951, at or about the hour of 1:00 o'clock p.m., while in the course and scope of his employment as chef for Mare Island Cafeteria System, without fault or negligence on his part, and in the exercise of due care and prudence while descending the aforesaid

stairway at said premises, was caused to and did fall down said stairs, negligently maintained by said Defendant United States of America, by its agents, servants and employees; that Defendant negligently and carelessly permitted the said stairway to become and remain unsafe, insecure, unlevel, dangerous, and otherwise defective and out of repair, with metal stair tread elevated and projecting, as to be dangerous to the life and limbs of persons traversing said stairway, as Defendant well knew, and of which condition had both actual and constructive notice and full knowledge of the unsafe and dangerous character of said stairway and negligently permitted it to remain in such condition; and negligently and carelessly failed to place any sign or notice to indicate the danger incident to the aforesaid condition and to remedy said condition; that wholly and solely by reason of, and as a direct and proximate result of the negligent and careless acts and omissions of the Defendant as aforesaid, said Plaintiff was caused to and did fall and was precipitated down said stairway and thereby sustained and was proximately caused to receive, and did thereby receive and suffer severe and grievous personal and bodily injuries and damages as follows, to-wit:

Said Plaintiff was rendered sick, sore, lame and disabled and did suffer great and grievous pain and suffering; he sustained an oblique fracture of the lower end of the left fibula and a sprain of the lower back; Plaintiff is informed and believes that said injuries are permanent in character; that by

reason of his said injuries and of the said pain, suffering and sickness which are continuing, and as a proximate result thereof, Plaintiff has been damaged in the sum of Fifteen thousand (\$15,000.00) Dollars;

VI.

That by reason of aforesaid negligence and as a proximate result thereof, expenses for the medical attention of Plaintiff in the sum of \$235.76 was incurred; that at the time of his said injuries Plaintiff was capable of earning not less than \$375.00 per month; that as a proximate result of the negligence of the Defendant and the resulting injuries so sustained, Plaintiff was unemployable to July 7, 1952, to his further damage; that under the circumstances the persons responsible for the maintenance, control and operation of said stairway, if they were private persons, would be liable to the Plaintiff for his damage for the negligent maintenance, control and operation of said stairway;

VII.

That all of the injuries to the Plaintiff herein described and the pain, suffering, disability, loss, expense and damages incident thereto, were proximately caused by the carelessness and negligence, as aforesaid, of the Defendants and each of them, their servants, agents and employees.

Wherefore Plaintiff prays judgment against Defendant for the sum of Fifteen thousand (\$15,000.00) Dollars, general damage, special damages as

alleged, cost of suit and for such other and further relief as to the Court may seem meet.

/s/ THOMAS M. MULVIHILL,
Attorney for Plaintiff

Duly Verified.

[Endorsed]: Filed November 19, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant United States of America and by way of answer to the complaint on file herein admits, denies and alleges as follows:

I.

Answering paragraph IV of the said complaint, defendant denies that said stairway was used or intended for the use of any tenants, employees of tenants, or the general public or that said stairway was so used by any tenants, employees of tenants, or the general public.

II.

Answering paragraph V of the said complaint, defendant denies that it or any agent or servant of the United States was negligent or careless in any respect and further denies that any premises within the charge of the United States or of any agency or employee of the United States was in a dangerous or defective condition or that any premises within the charge of the United States or any agency or employee of the United States was un-

safe, insecure, unlevel, dangerous, or otherwise defective or out of repair. Said defendant further answering said paragraph alleges that he does not have sufficient facts to know the truth or falsity of the other allegations therein contained, and denies each and every, all and singular, of the other allegations therein contained.

III.

Answering paragraph VI of the said complaint, said defendant, always denying that it was negligent or careless in any respect and always denying that any agency or employee of said defendant was negligent and careless in any respect, alleges that it does not have sufficient facts to know the truth or falsity of the allegations therein contained, and denies each and every, all and singular, of the allegations therein contained.

IV.

Answering paragraph VII of the said complaint, said defendant, always denying that it was negligent or careless in any respect and always denying that any agency or employee of said defendant was negligent and careless in any respect, alleges that it does not have sufficient facts to know the truth or falsity of the allegations therein contained, and denies each and every, all and singular, of the allegations therein contained.

As and for a Separate and Distinct Defense to said Complaint said Defendant alleges as follows:

I.

That the plaintiff above named was himself negli-

gent and careless in the premises and did not exercise due and proper care for his own safety upon the said stairway and that said negligence and carelessness and said lack of proper care proximately contributed to the injury alleged by said plaintiff, if any.

As and for a Third Separate and Distinct Defense to the Complaint on file herein, said Defendant alleges as follows:

I.

That said Mare Island Cafeteria System is an unincorporated association wholly owned and controlled by the defendant United States of America; that the plaintiff was an employee of said Mare Island Cafeteria System and as such employee may not maintain an action against the United States of America under the Federal Tort Claims Act, Public Law 601, 79th Congress, Title IV, as amended (Title 28 USCA Sections 921, et seq.)

Wherefore, said defendant prays that said complaint be dismissed with costs assessed to the plaintiff.

Dated: January 25th, 1954.

LLOYD H. BURKE,

United States Attorney

/s/ By JAMES S. EDDY,

Assistant U. S. Attorney

Notice of Mailing attached.

[Endorsed]: Filed January 25, 1954.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

By this action, plaintiff seeks to recover for personal injuries which he sustained as a result of a fall down a staircase in a building owned by the United States at the Mare Island Naval Yard, Vallejo, California. At the time of his fall, plaintiff was an employee of the Mare Island Cafeteria System, a nonappropriated fund agency organized for the purpose of supplying food to the Naval Yard employees, working in the Commissioned Officers' Club, also a nonappropriated fund agency. The action is based on the provisions of Title 28 U.S.C.A. §1346(b), with the negligence of the United States claimed as being, (1) The failure to provide hand-railing for the staircase, (2) The protrusion of steel strips affixed to the edge of each step in such a manner that they created a hazard, and (3) The failure to properly light the staircase. Defendant, United States of America, bases its defense on the grounds that plaintiff was contributorily negligent, and that plaintiff was an employee of the United States, and thus not entitled to recover under the Federal Tort Claims Act.

This action was tried by the Court sitting without a jury on October 24, 1956, at the conclusion of which trial, the Court ordered the matter submitted. For good cause, the Court, on November 1, 1956, vacated its previous order submitting the case for decision, and ordered both parties to submit

posttrial memoranda. On November 15, 1956, in compliance with the order of the Court, plaintiff filed his memorandum. Under the terms of the Court's order, defendant was required to file its answering memorandum within fifteen days after receipt of plaintiff's opening memorandum, and plaintiff was given the right to reply thereto. Counsel for plaintiff has certified that a copy of his opening memorandum was mailed to counsel for defendant, United States, on November 14, 1956. Upon examination of the file by the Court on July 22, 1957, the record disclosed that counsel for defendant has not only failed to make any effort to comply with the time limitation set forth in the Court's order, but has failed to file any memorandum whatsoever. The record is devoid of any reasons for this delay, if, indeed, such dereliction could ever be justified. Sufficient time having elapsed to allow defendant to make a response, it appears obvious from the record that defendant does not intend to respond. Accordingly, the matter has been ordered submitted as of July 22, 1957.

The failure of defendant to afford the Court any help in this matter might be taken as an indication that it does not desire to contest the contentions made by plaintiff. Certainly it puts the Court in the unenviable position of having to do the work that properly should be done by counsel for defendant.

Defendant contends that plaintiff is without status to propel a Federal Tort Claims action. With

this, the Court does not agree. Plaintiff argues that he has a right to recover from defendant for his injuries (he not being an employee of defendant at the time of the accident) under the common law rules of negligence. His position in this regard appears to the Court to be sound. The remaining issues to be resolved are whether defendant was negligent, and whether plaintiff was guilty of contributory negligence. From the record and the applicable law, it appears to the Court that defendant was negligent in its conduct toward plaintiff, and that plaintiff was not guilty of any negligence which contributed to the accident and/or his injuries.

The Court is of the view that on the issue of liability the judgment must be for plaintiff.

It Is, Therefore, Ordered that judgment be for the plaintiff on the issue of liability in this case, and that this case be set down for further trial on Friday, September 13th, 1957, for the purpose of fixing the damages sustained by the plaintiff. Each of the parties will be prepared to proceed on this date to present to the Court any evidence that may bear upon the issue of damages in this case. The issue of damages is the sole question that will be considered by the Court on the date last mentioned above.

Dated: August 2nd, 1957.

/s/ SHERRILL HALBERT,
United States District Judge

[Endorsed]: Filed August 2, 1957.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

This Court has heretofore resolved the issue of liability in this case and supported its opinion in that regard by a Memorandum and Order, filed herein on August 2, 1957. By that order the matter was set down for further trial on the issue of damages on September 13, 1957. The trial on the issue of damages came on regularly for hearing on this latter date. Both parties appeared by their respective counsel, and in due course the matter was submitted for decision and determination by the Court.

After having given full consideration to all of the evidence adduced in this case, the Court has come to the conclusion that plaintiff is entitled to recover from the defendant, United States of America, damages in the sum of \$12,673.26, and accordingly judgment will be entered in favor of the plaintiff and against the defendant in this amount.

It Is, Therefore, Ordered that plaintiff have judgment against the defendant, United States of America, in this action in the sum of \$12,673.26 (This includes both general and special damages), together with any costs which may be authorized by law. Plaintiff will prepare findings of fact and conclusions of law, a form of judgment and any and all other documents necessary to the final disposition of this case in accordance with this order, and lodge them with the Clerk of this Court at the time

and in the manner prescribed by the applicable rules and statutes.

Dated: December 31, 1957.

/s/ SHERRILL HALBERT,
United States District Judge

[Endorsed]: Filed December 31, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial before the above-entitled Court, the Honorable Sherrill Halbert, United States District Judge, presiding, without a jury, on the 24th day of October, 1956, and thereafter continued to September 13, 1957, the plaintiff appearing by his attorney, Ernest E. Emmons, Jr., and the defendant appearing by Lloyd H. Burke, United States Attorney by Robert E. Woodward, Assistant United States Attorney, and evidence, oral and documentary, having been introduced, and the matter having been submitted for decision, the court being fully advised, hereby makes the following:

Findings of Fact

The Court finds:

1. That this Court has jurisdiction of this cause of action by reason of the provisions of the Federal Tort Claims Act, Title 28, U.S.C., Section 921-946. That on November 21, 1951, at or about 1:00 o'clock

p.m., plaintiff sustained personal injuries as a result of a fall down a staircase in a building owned and maintained by the United States of America, located at the Mare Island Naval Yard, Vallejo, California.

2. At the time of his fall, plaintiff was an employee of the Mare Island Cafeteria System, a non-appropriated fund agency organized for the purpose of supplying food to the naval yard employees. Plaintiff was working in the Commissioned Officers' Club, also a non-appropriated fund agency.

3. That on the date of plaintiff's accident and fall as aforesaid, the defendant, United States of America, was negligent in:

(1) Failing to provide a hand rail on the right hand side descending of said staircase,

(2) Permitting the protrusion of steel strips affixed to the edge of each step in such a manner that they created a hazard to persons walking down said steps, and

(3) Failure to properly light the staircase at the time in question.

4. At the time of plaintiff's said accident and fall, plaintiff was not an employee of the defendant, United States of America.

5. That at the time of plaintiff's accident and fall, as aforementioned, plaintiff was not guilty of contributory negligence.

6. That under the laws of the State of California, liability would be imposed upon the defendant, United States of America, if a private person.

7. That by reason of the negligence of the defendant as aforesaid, and as a direct and proximate result thereof, plaintiff sustained personal injuries as follows:

An oblique fracture of the lower end of the left fibula, sprain of the low back, exacerbation of pre-existing infirmities and was made sick, sore, lame and disabled;

that such disability is permanent in character.

8. That by reason of the negligence of the defendant and as a proximate result thereof, plaintiff required and received medical and hospital care and attention supplied and paid for by the California State Fund Insurance Company, insurance carrier for plaintiff's employer, in the amount of Four Thousand Eighty Five and 76/100 Dollars (\$4,085.76).

9. That plaintiff, for many years, was unable to perform his regular occupation as a cook, thereby suffering loss of wages.

Conclusions of Law

From the foregoing facts, this Court finds, as conclusions of law:

That plaintiff is entitled to recover damages from the defendant, United States of America, and is entitled to judgment as follows:

1. For the sum of Twelve Thousand Six Hundred Seventy Three and 26/100 Dollars (\$12,673.26); and

2. For his costs incurred herein; and

3. That California State Fund Insurance Company has a lien against plaintiff's recovery herein in the sum of Four Thousand Eighty Five and 76/100 Dollars (\$4,085.76) for compensation and medical services paid to and on behalf of plaintiff.

Let judgment be entered accordingly.

Dated: This 5th day of February, 1958.

/s/ SHERRILL HALBERT,
United States District Judge

Certificate of Service by Mail attached.

[Endorsed]: Filed February 5, 1958.

In the District Court of the United States, Northern District of California, Northern Division

No. 6772

FERNANDO S. FORFARI, Plaintiff,

vs.

UNITED STATES OF AMERICA, FIRST DOE,
SECOND DOE, FIRST CORPORATION, a
corporation, Defendants.

JUDGMENT

This cause having come on regularly for trial before the United States District Court for the Northern District of California, Northern Division,

Honorable Sherrill Halbert, United States District Judge, presiding, with Ernest E. Emmons, Jr., and Thomas M. Mulvilhill, by Ernest E. Emmons, Jr., appearing as attorney for the plaintiff, and Lloyd H. Burke, United States Attorney, by Robert E. Woodward, Assistant United States Attorney, appearing for the defendant, United States of America, and the Court being fully advised in the premises and having filed herein his Findings of Fact and Conclusions of Law and having directed that judgment be entered in accordance with said Findings of Fact and Conclusions of Law,

Now, Therefore, by reason of the law and findings as aforesaid,

It Is Hereby Ordered, Adjudged and Decreed:

1. That plaintiff have judgment against the defendant, United States of America, in the sum of Twelve Thousand Six Hundred Seventy Three and 26/100 Dollars (\$12,673.26) and for his costs incurred herein, taxed at \$89.26; and

2. That the California State Fund Insurance Company be awarded, out of the recovery of plaintiff herein, to be paid out of but not in addition to the judgment herein, the sum of Four Thousand Eighty Five and 76/100 Dollars (\$4,085.76).

3. That Ernest E. Emmons, Jr., and Thomas M. Mulvilhill, as plaintiff's attorneys, be awarded twenty (20%) per cent of the recovery of plaintiff herein, to be paid out of but not in addition to the judgment herein.

Done in open court this 5th day of February,
1958.

/s/ SHERRILL HALBERT,
United States District Judge

Entered in Civil Docket February 5, 1958.

Certificate of Service by Mail attached.

[Endorsed]: Filed February 5, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Memorandum and Order dated December 31, 1957, in which it was ordered plaintiff have judgment against the defendant United States of America in the sum of \$12,673.26, together with any costs which may be authorized by law, and from the Judgment entered in this action on February 6, 1958.

LLOYD H. BURKE,
United States Attorney,
/s/ By ROBERT E. WOODWARD,
Assistant U. S. Attorney
Attorneys for Appellant United
States of America

[Endorsed]: Filed February 26, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk, of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated.

Complaint.

Motion to dismiss.

Minute order denying motion to dismiss.

Answer.

Memorandum and order filed Aug. 2, 1957.

Memorandum and order filed Dec. 31, 1957.

Findings of fact and conclusions of law.

Judgment.

Notice of appeal.

Order extending time to docket appeal.

Order extending time to docket appeal.

Designation of contents of record on appeal.

Plaintiff's exhibits 1, 2 and 3.

Defendant's exhibits A, B, C and D.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 26th day of May, 1958.

[Seal]

C. W. CALBREATH,

Clerk

/s/ By C. C. EVENSEN,

Deputy Clerk

In the District Court of the United States, North-
ern District of California, Northern Division

No. 6772

FERNANDO S. FORFARI, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

REPORTER'S TRANSCRIPT

Wednesday, October 24, 1956

Friday, September 13, 1957

Before Hon. Sherrill Halbert, Judge.

Appearances: For the Plaintiff: Ernest E. Emmons, Esq. For the Defendant: James S. Eddy, Esq., and Robert E. Woodward, Esq., Assistant U. S. Attorneys. [1*]

Wednesday, October 24, 1956, 10:00 a.m.

The Clerk: Case No. 6772, Forfari vs. U. S., trial by Court.

The Court: Are you ready to proceed, gentlemen?

Mr. Eddy: Yes, your Honor.

Mr. Emmons: Ready, your Honor.

The Court: Mr. Eddy, you were not in the court room a few moments ago; Mr. Woodward was here, and I told Mr. Emmons that I proposed to try the question of liability in this case before I consider

* Page numbers appearing at top of page of Reporter's Transcript of Record.

the matter of the damages in the case, because I thought that the question of liability was one that was so thoroughly debatable that I ought to save either side the expense of bringing medical testimony here until we knew just where we were going from that standpoint.

Mr. Eddy: That is quite satisfactory.

The Court: So that is the way I propose to proceed. I also said that if it developed it was necessary to take some time to arrive at a conclusion I will grant you time within which to get your medical testimony before the Court, so you don't need to worry about being cut off at the pockets, either side.

Mr. Eddy: Very well, your Honor.

The Court: All right, proceed.

Mr. Emmons: If your Honor please, I have one witness here who came up from San Francisco, who represents the [2] State Fund Insurance Company. All he will do is establish the amount of the compensation——

The Court: Can't you stipulate to that?

Mr. Emmons: Can you stipulate to that?

Mr. Eddy: I believe I have the amount in the file.

The Court: Well, see if you can't get together. Take a moment here and see if you can't get together.

Mr. Emmons: The amounts are \$235.76 for medical expenses; temporary compensation, \$1350, and settlement payment in regard to permanent dis-

ability rating in the sum of \$2500. That is a total of \$4,085.76.

Mr. Eddy: If your Honor will give me just a moment, I believe I have those figures in some official communications.

The Court: All right. Do you have a gentleman here who can produce the figures? Take a look at those records, Mr. Eddy.

Mr. Emmons: Do you have your figures?

The Court: Bring them up here and let counsel look at them, will you please?

Mr. Emmons: Show them to Mr. Eddy, please?

The Court: Those figures would have no bearing on this case, any how, except insofar as they have any lien against any judgment I grant in this case.

Mr. Eddy: I will stipulate that \$235.76 was spent by the State Compensation Insurance Fund for medical attention, and [3] \$1350 was spent by the State Compensation Insurance Fund for temporary compensation payments, and that \$2500 was spent by the State Compensation Insurance Fund in settlement of a claim for permanent injury in this matter.

Mr. Emmons: I will accept that stipulation. May the witness be excused.

The Court: This gentleman may be excused, then.

Mr. Eddy: Yes, as far as the government is concerned.

The Court: Let us proceed. I may say that I have read your memos, each of your memos in this matter and I am familiar with those facts.

Mr. Emmons: Will you step up, please?

FERNANDO S. FORFARI

the plaintiff, called in his own behalf, sworn.

Direct Examination

Mr. Emmons: Q. Will you state your full name for the record, please?

A. Fernando S. Forfari.

Q. Where do you live, Mr. Forfari?

A. I live 855 Sonoma Boulevard.

Q. Sonoma Boulevard in Vallejo, California?

A. Vallejo.

Q. Will you tell us your age, Mr. Forfari?

A. I beg your pardon?

Q. What is your age? [4]

A. My age is—born in 1876. I would be about 80 years old, I guess.

Q. How old are you? A. About 80.

Q. You will be 80 next month?

A. No, last July.

Q. You were 80 last July?

A. Yes, July 17th.

Q. Now, do you remember having had an accident on November 21, 1951? A. Yes.

Q. And where were you working at that time?

A. I was working on the club there at Mare Island.

Q. At Mare Island? A. Yes.

Q. That is at the Navy yard, is it?

A. Yes.

(Testimony of Fernando S. Forfari.)

Q. Were you working at the Officers' Club there?

A. For the Officers' Club, yes.

Q. And who were you employed by?

A. Employed by the Cafeteria System.

Q. The Mare Island Cafeteria System, is that right? A. Yes.

Q. Now, how long had you worked for the Mare Island Cafeteria System— [5]

A. Well—

Q. Wait just a minute until I finish. —before you got hurt? A. Oh, before I got hurt?

Q. Before you got hurt.

A. Nine or ten months, I forget, something like that.

Q. And how much money were you making there at that time? What was your rate of pay?

A. The rate was about 350 a month, I guess.

Q. 300 what? A. A month.

Q. 360 a month?

A. I mean 50, 350 a month.

Q. 350 a month? A. About.

Q. And what kind of work did you do there?

A. Chef work, you know, prepare all the dinners and everything.

Q. You were a cook, is that right?

A. Yes, cook, yes.

Q. Where had you worked before that job, Mr. Forfari?

A. Before that I was working on the Senator Hotel.

(Testimony of Fernando S. Forfari.)

Q. Here in Sacramento? A. Yes.

A. And how long did you work at the Senator Hotel?

A. About 22 or 23 months, something in there.

Q. And from that job you went to the one at Mare Island? A. Yes.

Q. How long have you been a cook?

A. Oh, a long time. I was cooking home, you know, in Brickley.

Q. Now, do you remember on the day of this accident, November 21, 1951? A. Yes.

Q. What time did you go to work on that day?

A. About 1:00 o'clock.

Q. About 1:00 o'clock. And were you on the premises of the Officers' Club there at that time?

A. Yes.

Q. And that is where you reported for work, is it? A. Yes.

Q. And about what time did this accident happen?

A. Oh, about one o'clock. I just went up stairs to the lavatory and then to come down to check the kitchen and then I fell down the steps.

Q. Now, let me see. Had you as yet gone into the kitchen to work? A. Yes.

Q. You had already gone into the kitchen to work? A. No.

Q. Not yet? [7] A. Not yet.

Q. You went upstairs to the lavatory?

A. Then come down.

(Testimony of Fernando S. Forfari.)

Q. And it was coming down the stairs that this accident happened, is that right?

A. That is when it happened.

Q. How many stairs are there at that particular place?

A. Oh, about nine steps, I guess.

Q. And do you know about how deep the risers are between the steps?

A. Well, I don't remember. I measured then, I remembered, but I don't remember.

Q. You don't remember that now?

A. No.

Q. Do you remember the width of the stairs, how wide the stairs were?

A. No, I can't remember that. I marked them down and give them to the attorney.

Q. Yes. Let me ask you this: you went up the stairs to the lavatory. Now, is the lavatory right directly in front of the top of the stairs or to the right?

A. It is to the right side.

Q. To the right, is it? A. Yes.

Q. Is there a hall that goes to the right? [8]

A. To go in.

Q. Is there a light in that hall?

A. On the ceiling, yes, a light, yes.

Q. Was there a light at the time of this accident directly above the stairs in any place?

A. I don't remember exactly if there was any light or not. It was a kind of dark day, you know what I mean, a gloomy day.

Q. Was it light above the stairs?

(Testimony of Fernando S. Forfari.)

A. No, I didn't see any.

Q. No lights there. And as you walked down the stairs could you see the stairs clearly?

A. No, couldn't see.

Q. Where was the light? The only light that you remember, where was that located?

A. When I come down the light was in the back of me.

Q. The light was to your back? A. Yes.

Q. As you were going down the steps?

A. As I was going down the steps.

Q. So that light would be in the hallway, is that right? A. Yes.

Q. And then as you left the lavatory and going down this hall you had to make a left turn to go down the stairs, is that right? A. Yes.

Q. Can you tell us what if anything was on the stair treads [9] themselves?

A. On the stairs there was nothing there, only plain wood.

Q. The stairs were plain wood, is that right?

A. Yes.

Q. Did it have a metal strip on it?

A. It had a metal strip on the front of the steps, just a very narrow metal strip.

Q. A very narrow metal strip? A. Yes.

Q. Was it in front of each step?

A. Every step, yes.

Q. And was there a handrail on either side—

A. No rail at all.

Q. —of the stairs? A. No.

(Testimony of Fernando S. Forfari.)

Q. There was not. On either side of the stairs as you went down was a blank wall?

A. A wall on both sides, yes.

Q. If you stood there in the middle of the stairs could you reach out and touch the walls with your hands?

A. I don't think so. I might. I forget, I don't know.

Q. You forget how wide it was?

A. I don't think I could reach both sides, no.

Q. Now, when you came out of the lavatory, Mr. Forfari—strike that, please. Can you tell us how far you got down the [10] stairs before you fell? How many steps had you gone down?

A. The second step, I guess. First I stepped down and then the second step I tripped down on my shoes and then I went, my balance went down.

Q. Do you recall what caused you to trip?

A. Well, the metal there caught me on my heel.

Q. Your heel caught on that metal strip?

A. On the metal strip, yes.

Q. Then what happened to you?

A. Then I fell down then.

Q. You fell down? A. Yes.

Q. Did you fall all the way down the remainder of the stairs to the bottom?

A. It was about three steps before I got down, yes.

Q. And when you fell did you feel any pain?

A. Oh, yes.

Q. Did you have pain immediately?

(Testimony of Fernando S. Forfari.)

A. Had pain right away, yes.

Q. When you fell to the bottom of the stairs what happened to you then? Did anybody help you?

A. Then I hollered then and then the fellow come over there and he give me a hand there, he put me in the chair and then he called the manager, and the manager take his car and take me down to the dispensary. [11]

Q. To the dispensary? A. Yes.

Q. What did they do for you at the dispensary?

A. At the dispensary the doctor examined me, he say you have got a broken ankle, you have got to go to the hospital. And he says, "You work for the cafeteria, I can't put you in the government hospital, because you don't work for the government."

Q. I see.

A. So he called up Vallejo.

Q. General Hospital?

A. General Hospital, and the ambulance come and took me over there.

Q. Do you recall how long you were there?

A. Oh, approximately three or four days, something like that, I forget.

Q. What did they do for you when you first got there?

A. They took a X-ray and then they put me in a cast.

Q. Put your ankle in a cast? A. Yes, sir.

Q. Let me ask you this: did you have any trouble in any other part of your body as a result of the accident?

(Testimony of Fernando S. Forfari.)

A. I had trouble with my back when I fell down.

Q. Your back?

A. My back hurt all the time. [12]

Q. Did they take X-rays when you were in the hospital?

A. They don't take X-rays of my back, they take X-rays of my foot.

Q. No X-rays of your back, just your ankle, is that it?

A. Because I don't feel the back at that time; because of the heavy pain on my foot, I didn't feel the back at all.

Q. You were in the hospital three days?

A. I don't remember, three or four days, something like that.

Q. And they put a cast on your left ankle?

A. Yes.

Q. How far up your leg did the cast go?

A. Oh, about a foot and a half high, something like that.

Q. When you had the cast on were you able to walk with it? A. No.

Q. Were you in bed?

A. No, I got crutches.

Q. You were on crutches?

A. Yes, two crutches.

Q. Were you able to walk with the two crutches?

A. Yes, a little bit in the house. That is all I could do.

Q. How long would you say you were on those crutches?

(Testimony of Fernando S. Forfari.)

A. Oh, maybe about three months, I guess, something like that.

Q. And then you were able to get rid of the crutches? [13]

A. When I got rid of the crutches I got a cane. I use a cane because I was afraid to fall down. If I step on something, you know, I might go down, so I used the cane.

Q. How long did you have the cast on?

A. Oh, around about a month and a half or so, something like that.

Q. A month and a half or two?

A. About two months or more. I forget.

Q. How long did you use a cane?

A. Oh, I used a cane for quite a while.

Q. You used a cane for quite a while?

A. Yes.

Q. Do you use the cane now? A. No.

Q. You don't use the cane now?

A. No, I don't use the cane now.

Q. Do you still have trouble with your left ankle?

A. Oh yes, all the time. If I walk a little too much, you know, it will swell up and pain.

Q. The ankle swells up and you have pain?

A. Yes.

Q. Did you go back to work at any time, Mr. Forfari?

A. Well, the manager of the cafeteria, you see, he used to come down to the hospital, he was pretty nice with me, and then he came down and saw me

(Testimony of Fernando S. Forfari.)

in the house too. So if I recall right, [14] I think around the last part of June he called me, "Do you want to go back to work again?"

I said, "Sure, I work for you any time. I don't know if I can, but I will try."

He said, "All right." He said, "I will let you know." He said, "I am going to open up the central cafeteria." He said, "I want you to come over there and work there."

So I did. I worked over there, I don't know, about four weeks, something like that. And, you know, this fall bothered me a little bit in my foot all the time. But anyway, the cafeteria, the manager told me he is going to close up the cafeteria because we are not doing any business. And I said, "That is all right, I can't stand much longer myself to work any more."

Q. Did you have trouble with your ankle while you were working there at that time?

A. Well, it pained a little bit all the time, you know, because I have to stand up eight hours—seven hours, because we have got a hour to eat.

Q. Now, were you able to or did you do any work after that?

A. No, I never did any work.

Q. Have you done any work since?

A. Never worked since.

Q. Now, before this accident, Mr. Forfari, were you able to do your work without any pain or discomfort? [15]

(Testimony of Fernando S. Forfari.)

A. Well, I just worked in the house and that is all I can do.

Q. I think you misunderstood. Before the accident were you able to do your work as a chef?

A. Oh yes.

Q. Without any discomfort or pain?

A. Oh yes, sure.

Q. And did you have any pain in that left ankle before this accident? A. No.

Q. None whatsoever? A. No.

Q. Did you have any pain in your back before your accident? A. No.

Q. Now, getting back to the pain in your back, when did you first discover the pain in your back after the accident?

A. I discover that just as I left the hospital. I told the doctor. He said, "Why didn't you tell me before?"

I said, "Well, the pain I had in my ankle then, I didn't feel the back at all. In fact, when I have got one pain on one side I don't feel the other."

Q. Did he take any X-rays of your back?

A. No.

Q. Never did. How long did that pain continue?

A. Oh, it continued most of the time. [16]

Q. Most of the time?

A. Yes. It even pains now.

Q. It pains now?

A. If I walk or stand up too much, you know.

Q. Now, what about your ankle now? Do you have pain in that ankle now? A. Yes.

(Testimony of Fernando S. Forfari.)

Q. And are you able to walk normally as you did before this accident?

A. Well, no. If I walk on rough, you know, gravel, something like that, you know it is no good for me. You see, it pains then. If I strike something, you know, with my foot, then I go down.

Q. Does the condition of your ankle cause you to limp now? A. Yes.

Q. Did you limp before this accident? Did you limp before the accident?

A. No—I limped a little bit before, yes.

Q. You limped before this accident, didn't you?

A. Oh yes, but not much, not like now.

Q. Did you have an accident once before to your ankle? A. No.

Q. To your hip? A. To my hip, yes.

Q. An automobile accident? [17]

A. Yes. That is a long time ago.

Q. As a result of that automobile accident did you limp a little bit? A. Yes.

Q. Now, when you walk now, Mr. Forfari, you limp, is that because of the condition of your ankle?

A. Well, if I step down—for instance, if I step down a stair, see, I can't lift anything from the floor up, I go down.

Q. Now, all of your medical expenses, Mr. Forfari, were paid by your employer's insurance carrier, were they? A. Yes.

Q. The State Compensation Insurance Fund?

A. Yes, that is right.

Q. And you settled whatever differences you had

(Testimony of Fernando S. Forfari.)

in regard to a permanent disability with them for the sum of \$2500? A. Yes.

Q. And you received compensation during the time—— A. That is right.

Q. ——that you were temporarily disabled, is that correct? A. Yes.

Mr. Emmons: I have no further questions.

Cross Examination

Mr. Eddy: Q. Mr. Forfari—— A. Yes.

Q. ——do you remember what the staircase looked like in 1951? [18]

A. Yes, I remember.

Q. I want to show you a photograph and ask you to look at it and see if you can tell me what it is.

The Court: You have got it the wrong way.

A. I don't have my glasses. I don't know.

Mr. Eddy: Q. Do you have your glasses with you?

A. No, I don't have no glasses with me. I don't use the glasses, only to see to read and write.

Q. Do you have them in your pockets?

A. No, I don't have them at all.

Q. You can see these photographs, then, very well?

A. No, not very well, because I don't have my glasses.

The Court: Q. Do you wear glasses regularly, Mr. Forfari?

A. No—only when I write, yes. Sometimes I

(Testimony of Fernando S. Fortari.)

write without glasses, but if I read small type, you know, I can't make it out.

Q. What I am getting at is can you or can't you see that photograph?

A. Oh, I can see the photograph, yes, but not plainly.

Q. Can you see what it is?

A. Yes, yes.

The Court: Show it to him. I think he is just simply saying he couldn't see too well.

(The photograph was handed to the witness.)

The Court: That is supposed to be a picture of those [19] stairs. Do you recognize it, Mr. Fortari?

A. Yes, that is the steps, yes, that is right.

Mr. Eddy: Well, now, you will notice that there are some metal strips along the front of those stairs, is that right? Can you see metal strips there?

A. Metal strips there, yes, on the steps, right on the top there.

Q. Is that what you were referring to when you were talking a moment ago?

A. Yes, that is right.

Mr. Eddy: I will offer this as Plaintiff's Exhibit No. 1, your Honor.

Mr. Emmons: I have no objection.

The Court: I don't know whether Mr. Emmons wants you to offer any exhibits for him at this time.

Mr. Eddy: At this time?

The Court: You said you were going to offer it as a plaintiff's exhibit.

(Testimony of Fernando S. Forfari.)

Mr. Eddy: Excuse me, your Honor, defendant's exhibit.

The Court: Is there any objection, Mr. Emmons?

Mr. Emmons: No objection.

The Court: Let it be received and marked Defendant's Exhibit A.

(The photograph referred to was marked Defendant's Exhibit A.) [20]

Mr. Eddy: Q. It was your testimony it was about the second step from the top where you fell?

A. Yes.

Q. And you used those stairs every day while you worked there, didn't you? A. Yes.

Q. And you worked there about nine months?

A. I guess, something like that. I don't know.

Q. Now, on this day that you fell there wasn't any banana peel on the stairs, was there?

A. No.

Q. Or anything like that?

A. No, I didn't see it.

Q. You didn't see any foreign object like a roller skate or a banana peel?

A. No, I didn't see anything like that, no.

Q. The stairs were clean as far as you knew?

A. Well, I guess, yes.

Q. And there wasn't any foreign substance on the stairs, was there?

A. No, I don't notice. All I remember that metal there.

Q. The metal was there, yes, but I mean there was nothing——

(Testimony of Fernando S. Forfari.)

A. I don't remember the other, anything else, this far away. You know, it is five years ago.

Q. Yes. Well, now, this metal strip, as far as you know, [21] was tacked down, wasn't it? It wasn't loose?

A. Well, I suppose it was loose or something, because I stubbed my shoe there when I fell. It must be something.

Q. Well, you didn't see that it was loose, did you? A. No.

Q. Now, as a matter of fact this metal strip sticks up a little bit, doesn't it, above the level of the stair?

A. Maybe it was a little bit up, I suppose.

Q. But that is not more than about a 16th of an inch, is it?

A. I suppose so, I don't know. I never measured it.

Q. Just a very little bit?

A. A very little bit, yes.

Q. Yes. A. That is right.

Q. Now, I call your attention to the staircase here and to the room up above. Now, that was the locker room, wasn't it? Would you look at the picture, please? A. Yes.

Q. That is the locker room up there?

A. Yes, locker room.

Q. And the lavatory is off to one side, isn't it?

A. Yes, on the side, back there, yes.

Q. Well, is it not true that there is a light in

(Testimony of Fernando S. Forfari.)

the ceiling of the locker room that shines right down the stair? [22]

A. I didn't see any light then. If there was any light then it was on my back, because there was no light in the top there. Back here in the ceiling, I know at the top of the steps there was no light there.

Q. I don't mean in the stairwell, I mean in the room at the head of the stairs, isn't there a light that shines down the steps?

A. There was a couple of lights up there, I don't know; there is two, for sure.

Q. In the locker room?

A. Yes, in the locker room.

Q. Isn't it true that one of those lights is so situated that it shines down the stairs?

A. Maybe it is. I forget anyway.

Mr. Eddy: I call the Court's attention to the answers to the requests for admissions made in this case, questions number 23, 24, and 25 and 26.

Q. I believe, Mr. Forfari, that at the request of the government you answered some questions for us, and you described the staircase as being 38 inches wide. Is that about right? If you will look at that picture now, I am referring to the staircase, from side to side as being 38 inches wide. Is that about right?

A. Well, I don't remember. I measured it at the time, but I don't remember what it was. I don't remember, it was [23] too far away.

Q. Thirty-eight inches from side to side, is that

(Testimony of Fernando S. Forfari.)

about right? A. Maybe it was, I don't know.

Q. I beg your pardon?

A. I measured it there once after the accident, I went there and measured it.

Q. Now, you can actually reach out this way 38 inches, can't you, Mr. Forfari?

(Demonstrating.)

A. I might. I never tried. I don't know. I doubt if I can reach both sides.

Q. Now, you had never made any complaint to the club officer or to your employer about this staircase, had you, before the accident?

A. No.

Q. You never told anybody—excuse me.

A. I say I don't make no complaint, no. Of the steps, you mean?

Q. Yes.

A. No, I never make no complaint, no.

Q. Now you say you went back to work, was it in July, July 7th of 1952?

A. Yes, sometime in there.

Q. And you worked as a cook on Mare Island then, didn't you? A. That is right. [24]

Q. You were able to perform your work satisfactorily, weren't you?

A. Well, it was satisfactory most of the time that I know. The manager thought very highly about my work.

Q. They didn't tell you that you couldn't do the work when you were there? A. Oh, no.

Q. Now, this washroom or locker room was for

(Testimony of Fernando S. Forfari.)

the employees, wasn't it? A. Yes.

Q. There was another lavatory for the officers' use, wasn't there?

A. Oh, yes, there was an officers' lavatory, yes.

Q. I mean the members of the club had one that they used?

A. Oh, yes. I guess so; I don't know.

Q. But this was for the employees?

A. This was for the employees in the back, yes, in the back of the kitchen, yes.

Mr. Eddy: No further questions.

Mr. Emmons: May I see this photograph? Counsel, may it be stipulated that this photograph was taken——

Mr. Eddy: Very recently.

Mr. Emmons: ——on the 10th of this month?

Mr. Eddy: Yes. I didn't ask that question of this witness, but I believe that testimony will show that the stairs [25] are substantially in the same condition now as they were in 1951. I mean as far as this photograph. The photograph shows the stairs in practically the same condition as they were back in 1951.

Mr. Emmons: I have no further questions. You may step down.

The Court: Do you have another witness on this issue of liability?

Mr. Emmons: I have no other witness on liability, your Honor.

The Court: Do you have a witness on the question of liability, Mr. Eddy?

Mr. Eddy: I do, yes. I would like at least for the purpose of the record to interpose a motion at this time on the ground that there has been no showing of any defective or dangerous condition of the premises here and that there has been no showing of any notice to anyone of any defective or dangerous condition of the stairway.

The Court: I will take the motion under consideration and I will reserve ruling.

Mr. Eddy: All right, your Honor.

The Court: It is understood that I will allow you to proceed by way of defense on this question of liability and Mr. Emmons and his client are in no way precluded from presenting evidence on the question of damages if I rule that there is liability.

Mr. Eddy: So stipulated.

Mr. Emmons: Yes.

The Court: All right, so there will be no misunderstanding.

Mr. Eddy: Mr. Sexson.

DALE SEXSON

called for the defendant, sworn.

The Court: I think we should also have an understanding that you are proceeding on this issue without any prejudice to your motion that you have made and upon which I have reserved ruling.

Mr. Emmons: Certainly, your Honor.

The Court: Very well.

Direct Examination

Q. (By Mr. Eddy): Mr. Sexson, you have given us your name. What is your address, please?

(Testimony of Dale Sexson.)

A. Mare Island Naval Ship Yard.

Q. And are you employed there?

A. Yes, sir.

Q. Are you a naval personnel or civilian?

A. Civilian.

Q. At this time what are your duties, sir?

A. I am manager of the CPO Club.

Q. In 1951 did you have the same duties?

A. I was manager of the Commissioned Officers' Club.

Q. Where is the Commissioned Officers' Club, please? [27] A. On Mare Island.

Q. Is it a building that has a number or something?

A. Oh, it is 396, if I am not—396, I think.

Q. And when you were manager of the Commissioned Officers' Club, who paid your salary?

A. Out of club funds.

Q. And how long were you the manager of the club? A. Two years.

Q. Now, did the club have the occupancy of the building of the number you have just given us?

A. Yes.

Q. Was it the only occupant of that building?

A. Yes.

Q. How many employees, approximately? You may not be able to remember exactly, but about how many employees did they have?

A. The club itself, I would say, as I remember, about six.

Q. And what were their duties?

(Testimony of Dale Sexson.)

A. There were two in the accounting office, two in the main office and myself and a janitor.

Q. Now, who was eligible for membership in the club? Was that commissioned officers of the Navy?

A. That is correct.

Q. And they used the club, did they, from time to time? A. Yes. [28]

Q. And I suppose could bring in guests, couldn't they? A. Bona fide guests, yes.

Q. Members of the public, were they permitted to use the facilities of the club?

A. Only as guests.

Q. The public wasn't permitted to come in except as guests of members of the club?

A. That is correct.

Q. Now, did any other clubs occupy the premises while the Commissioned Officers' Club was there? A. No, no.

Q. Did the Navy use the club for any purposes other than as a Commissioned Officers' Club at the time? A. No, sir, just club affairs.

Q. There was no ammunition stored there and no guns were fired and no drills were had or anything like that? A. No, sir, purely social.

Q. Now, do you know who was the owner of the building there? A. The United States Navy.

Q. I guess the Navy is the owner of all the property on Mare Island, is that right?

A. Yes, sir.

Q. And Mare Island is a military entity, is it not? A. That is correct.

(Testimony of Dale Sexson.)

Q. You have to have a pass to get in? [29]

A. That is correct.

Q. Now, is the Commissioned Officers' Club some kind of a instrumentality of the United States, did you know? A. Yes, sir.

Mr. Emmons: Just a minute, if the Court please, I will object on the ground it calls for a conclusion of this witness.

The Court: The objection will be sustained. The answer is stricken.

Q. (By Mr. Eddy): Well, is the club an organization of any kind? Was it organized?

A. Oh, yes sir.

Q. Was it organized pursuant to naval regulations?

A. Directly from the Department of Defense.

Q. Did it have a governing board?

A. Yes, sir.

Q. And who was on the board, did you know?

A. You say governing board? It was an advisory board, and a representative—an effort was made to have a representative from each command on the yard to promote the right interest in the club.

Q. Now, who appointed the advisory board?

A. The shipyard commander.

Q. He is a Navy Officer, is he not?

A. Yes, sir; Admiral.

Q. Now, what arrangement, if any, did the Commissioned [30] Officers' Club have with the Navy

(Testimony of Dale Sexson.)

itself as far as the use of this building is concerned?

A. Well, the same as any other activity, with this exception: there was no money appropriated for the operation of the place. It was—we called them non-appropriated monies and operate self-sustaining.

Q. Well, did the Commissioned Officers' Club pay any rent to the Navy for the use of this building?

A. No, no sir.

Q. Did the Commissioned Officers' Club have any money of its own?

A. Yes.

Q. What was the source of its money?

A. The different activities promoted within itself. For example, maybe, parties—it was non profit, make enough to pay for the expenses and refreshments.

Q. Now——

Q. (By the Court): In other words, the club got its revenue from its own activities, then?

A. That is correct.

Q. Was any membership fee charged?

A. No, no membership fee.

Q. You had to make it on the operation of the concern itself?

A. That is correct. [31]

The Court: All right.

Q. (By Mr. Eddy): Now, if any repairs were necessary to this building, how was the repair handled?

A. Notification to Public Works that keep all buildings up in good repair.

(Testimony of Dale Sexson.)

Q. Well, Public Works was a direct function of the United States Navy, is that right?

A. That is correct.

Q. And Public Works would make the repair?

A. That is correct.

Q. How would Public Works know that any repair was necessary?

A. By either a telephone call if it was a small job, or any major work to be done, through the advisory group, through the shipyard commander, and it would be started in that manner.

Q. While you were employed there did you spend your working hours in the club itself?

A. Yes, sir.

Q. Did your duties include—what did they include?

A. Well, the operation of each activity, each party, supervision of the club-rooms, examining of the furniture, if any painting needed to be done; by daily observation, casting an eagle eye around the rooms.

Q. It was within the scope of your duties, then, to look for repairs? A. Yes. [32]

Q. Now, I call your attention to Defendant's Exhibit A and ask you if you recognize that?

A. Yes, sir.

Q. What is it, please?

A. That is the stairway leading from the hallway to the rear of the galley, to the men's locker room.

(Testimony of Dale Sexson.)

Q. Did you have occasion to see that stairway in 1951? A. Oh yes; daily.

Q. Did you have occasion to see it on or around November 21, of 1951?

A. I am quite sure I did. I can't pinpoint it down, but there is hardly a day that I didn't make inspections through for cleanliness and so forth.

Q. Did you ever observe anything in disrepair as far as those stairs were concerned?

A. No, no.

Q. Did you ever receive any reports that those stairs were dangerous or defective in any way?

A. No, no.

Q. Referring to Defendant's Exhibit A, does that picture show that staircase in substantially the same condition it was in 1951?

A. It looks exactly the same.

Q. I call your attention to some metal strips which appear in the photograph to be along the front of the stairs. Do you [33] notice them?

A. Yes, sir.

Q. At my request did you make any measurements or did you closely examine those metal strips? A. Yes, sir.

Q. Do they stand above the level of the staircase in any way?

A. Just the thickness of a very thin piece of metal. I would say not more than a 16th of an inch, probably not that.

Q. How is the staircase lighted, Mr. Sexson?

A. In the locker room above, as I remember it,

(Testimony of Dale Sexson.)

there are two ceiling fixtures, one at one end of the room and one at the other. The light from the one just at the top of the stairway made the light for the stairway.

Q. Is it well lighted?

A. Yes, it always was.

Q. Who pays for the utilities that a club uses on those premises?

A. They are paid for out of the club funds, heat, lights, water and gas. They were at that time. I assume they are at the present time.

Q. That club is still in operation, is it not?

A. Yes, sir.

Q. But you are no longer the manager? You have been moved to some other job? [34]

A. That is right.

Q. The Commissioned Officers' Club carries liability insurance, does it not? A. Yes, sir.

Mr. Eddy: You may cross examine.

Cross Examination

Q. (By Mr. Emmons): Now, Mr. Sexson, from the photograph it is evident that there was no hand-rail on either side; that is correct, is it not?

A. That is correct.

Q. There never was one on there?

A. Pardon me?

Q. There never was one on there?

Mr. Eddy: I will object to that, your Honor, as what may have been the situation either before or after.

(Testimony of Dale Sexson.)

Q. (By Mr. Emmons): Well, was there one at the time of this accident, in November 1951?

A. Was there a handrail at the time of the accident? No.

Q. On either side? A. No.

Q. Now, you have mentioned that the club had six employees? A. That is approximately.

Q. Two men in the accounting, I think you said two men in the main office, yourself and a janitor. Weren't there any other employees? [35]

A. No. That was the regular club employees. That is just approximately. There may be one added or two added for a special party.

Q. Did you have a kitchen there?

A. Yes, there was a kitchen in the building.

Q. And when you gave parties was the kitchen used? A. The kitchen and dining room.

Q. It was used daily, wasn't it?

A. That is correct.

Q. By the officers? A. Yes, sir.

Q. And their guests? A. Yes.

Q. Where did you get the people who worked in the kitchen?

A. The club had a contract with the Mare Island Cafeteria System to furnish food for the club and the help and so forth. That was a yearly contract arrangement.

Q. This annual contract with the Mare Island Cafeteria System was just to provide all the necessary employees in the kitchen, is that right?

A. And food.

(Testimony of Dale Sexson.)

Q. And the food?

A. And the preparation of the food.

Q. And you had nothing to do with those employees and food? A. That is correct. [36]

Q. All you were interested in was having the food there and made available to the officers.

A. That is correct.

Q. And I take it, then, that you did not pay any of the employees who were in the kitchen, like the chef or any of the people who worked in the kitchen or dining room? A. That is correct.

Q. Is that contract in writing? A. Yes, sir.

Q. I want to ask you some questions about your exhibit A, the picture here, if I may. Now, this picture was made this month. In five years' time is it your testimony that there has not been any change in those stairs?

Mr. Eddy: I will object, your Honor. I don't believe that any changes made after the accident are admissible in this case.

The Court: No. The only purpose is to test the credibility of that photograph, I assume.

Mr. Emmons: Yes.

The Court: The objection is overruled.

Mr. Eddy: I believe the testimony, your Honor, was that the photograph shows it in practically the same condition as it was then.

The Court: Yes, and Mr. Emmons wants to know if it is his testimony that there has been no change in five years. [37] Proceed.

A. I wouldn't be able to say, since I left the

(Testimony of Dale Sexson.)

club in February of 1952. I know there were no changes up until the time I left.

Q. (By Mr. Emmons): I notice here on the stairs that there is evidently—you see those worn parts along the front of the stairs? That is linoleum, isn't it? A. Yes, sir.

Mr. Eddy: Well, your Honor, I don't think this makes much difference. I think that counsel is trying to show that there was a handrail placed on that at sometime since the accident.

Mr. Emmons: I am not discussing handrail.

The Court: He hasn't suggested that at all.

Mr. Eddy: That is what you are getting at, isn't it?

Mr. Emmons: No, I didn't even think about a handrail. I'm not even discussing it.

The Court: I think the evidence is admissible. Let it come in. He is talking about this photograph and what appears in the photograph at the present time.

Mr. Eddy: Well, the government will stipulate that a handrail was placed along the side there.

The Court: I am not interested in whether there were forty handrails put in there. He is asking about something that is in this photograph here. He mentioned the word [38] "linoleum." Now, I don't know what he is leading up to. Proceed, Mr. Emmons.

Q. (By Mr. Emmons): The linoleum there has been frayed and it is worn back beyond the position of this metal rise, hasn't it? A. May I—

(Testimony of Dale Sexson.)

Q. Doesn't it appear to be in there?

A. Well, it might appear to be in the photograph. However, I went up and looked at the steps yesterday to refresh my memory, and the linoleum is perfectly smooth, as smooth as it can be, no worn spots in it.

Q. Well, those right there in the photograph, those are worn spots, are they not, right in the front of each one of those steps?

A. No, no, it is just as smooth as this linoleum here.

Q. Here's the question I want to know: this metal strip along the front of each riser curves over the top of the step, does it not, so that it holds down the linoleum?

A. Yes, right over the edge of the step.

Q. And—— A. And that——

Q. Excuse me, go ahead.

A. And that, as I say, is enough to catch the linoleum.

Q. It would have to go back at least half an inch, would it not?

A. Well, it wasn't—I don't know yesterday just how far [39] back it did go, because the metal part went clear over to the wall on each side.

Q. Now, did you ever at anytime during the course of your inspection of this stair during the time that you were manager see anyone of these metal strips in disrepair? A. No.

Mr. Eddy: I will object, your Honor, as far as anything occurring after the accident. It certainly

(Testimony of Dale Sexson.)

makes no difference here. I think the question is too comprehensive.

The Court: The answer is "no," so it doesn't make any difference.

Mr. Eddy: I didn't hear it.

The Court: He said during the whole time he was there he never saw it in disrepair, so you don't need to worry about it.

Q. (By Mr. Emmons): Now, during the time you were manager had any of these metal strips been replaced?

A. No. I didn't find it necessary.

Q. Never had been replaced? A. No.

Q. Had the linoleum been replaced?

A. No. I didn't find that necessary either. It was used very little. It didn't get hard wear. The employees at the start of their shift, maybe a couple of times during their shift. [40]

Q. Well, I would say from the looks of the risers here, from the conditions of the risers as you marked, it would get substantial wear?

A. Well, over a period of time I imagine those do accumulate.

Q. Now, from the position of this photograph you are unable to see where that light you mentioned is located. Now, can you tell me so that I will know in my own mind where that light is located?

A. It is right up here in the ceiling.

(Indicating.)

(Testimony of Dale Sexson.)

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A. It is right up here in the ceiling.

(Indicating.)

(Testimony of Dale Sexson.)

Q. Is it in the middle of the room back here or to the right?

(Indicating.)

A. No, I would say it is right here.

Q. Would you put a little mark where you have made that indication on Defendant's Exhibit A?

A. (The witness marked on photograph.) I would judge right about there. In other words, I noted yesterday it wasn't right square in the center of the staircase but just to the—it covered it with light.

Mr. Emmons: I think that is all. I have no further questions.

Mr. Eddy: Your Honor, I would like at this time—I think it might be appropriate to put in evidence this regulation under which the messes are organized. It is something [41] of which the Court can take judicial notice.

Mr. Emmons: What mess?

Mr. Eddy: It is Naval regulations.

Mr. Emmons: What mess?

Mr. Eddy: The Commissioned Officers' Club.

Mr. Emmons: Well, if your Honor please, I don't think it is material actually, because by the admission of this man the plaintiff in this case was not employed by the Commissioned Officers' Club, but was employed by the Mare Island Cafeteria System, which was, by his own admission, an independent contractor.

Mr. Eddy: Well, that is quite true, but——

The Court: Well, I don't know what the legal

aspects are right at this moment, but I think this may be of some concern to us.

Mr. Emmons: Could be. I have no objection.

The Court: So I am going to admit it as Defendant's Exhibit B.

Mr. Eddy: Very well.

The Court: Is it something I can take judicial notice of anyway.

Mr. Emmons: Very well.

(The document referred to was marked Defendant's Exhibit B.)

The Court: Do you have any more questions of Mr. Sexson, Mr. Eddy? [42]

Mr. Eddy: No, your Honor.

The Court: All right, step down. We will take the morning recess at this time.

(Recess.)

The Court: You may proceed, gentlemen.

Mr. Eddy: The government will call Mr. Will Hall. Will you be sworn, please, Mr. Hall?

WILL HALL

called for the government, sworn.

The Clerk: And your name, please?

A. Will Hall.

Direct Examination

Q. (By Mr. Eddy): You have given us your name, Mr. Hall. What is your address, please?

A. 509 - 3rd Street.

Q. Vallejo? A. Yes sir.

Q. And what is your occupation, please?

(Testimony of Will Hall.)

A. Janitor work.

Q. And where do you work?

A. I work at the CPO Club now.

Q. Did you work on the Mare Island Navy Shipyard in 1951? A. Yes.

Q. Where did you work?

A. I worked in the officers' club. [43]

Q. I call your attention to Defendant's Exhibit A, a photograph, and ask you if you know what it represents there?

A. It is a step up to the dressing room we use.

Q. Now, did you have occasion to clean those stairs in the course of your duties?

A. Yes, sir, I cleaned them every day.

Q. And were you there in the month of November of 1951? A. Yes, sir.

Q. Was it a part of your duties to observe whether or not the premises needed repair?

A. Yes sir.

Q. And what would you do if you found some of the premises that needed repair?

A. Tell Mr. Sexson.

Q. You would report that to Mr. Sexson?

A. Yes, sir.

Q. Now, did you ever notice any needed repairs on this staircase? A. No sir, never did.

Q. Did you know Mr. Forfari, who is the plaintiff in this case? A. Yes sir.

Q. Did he ever make any report to you that he considered this staircase to be dangerous?

A. No sir. [44]

(Testimony of Will Hall.)

Q. Did anybody say that? A. No.

Q. Did you ever make any report to Mr. Sexson that you considered the staircase to be dangerous?

A. No sir.

Q. How was that staircase lighted?

A. It was lighted at the top—there were four or five lights in the hall and the dressing room, there was about four or five lights there, and one right at the doorway as you come up there.

Q. Was there a light at the top of the stairs that would shine down the stairs?

A. Yes, right on the corner.

Q. Calling your attention to the photograph, I see there is a door in the foreground of that photograph on the right hand side. Where did that door go to from the staircase?

A. As you go up there is a hallway there.

Q. Well now, if you will look at Defendant's Exhibit A you see a large door—you can't see the top of it—on the right-hand side of the photograph in your hand? A. Yes.

Q. What is on the near side of that door, on the downstairs side of that door?

A. On the near side?

Q. Well, is there a hall in there? [45]

A. Yes, there is a long hall that goes there.

Q. Were there any lights in that hall?

A. Yes.

Q. Where were they?

A. Up in the ceiling.

(Testimony of Will Hall.)

Q. Was there any light in that hall that would shine on the stairs?

A. Yes, there was one light there at the door.

Q. There was one light there at the door?

A. Yes. I would unlock the door to go up there every morning.

Q. Do you remember the occasion when Mr. Forfari was hurt? A. Yes sir.

Q. Were you working at the club at that time?

A. Yes sir.

Q. Did you make any examination of the staircase after he fell? A. No, I didn't.

Q. Had you seen it during that day?

A. Oh, yes, I lived up there.

Q. Did you live up there at that time?

A. Yes.

Q. Where was your room?

A. Right there next to the main rest room there.

Q. I see. Did you have occasion to look at the stairs [46] after he fell?

A. Yes, going back and forth up there.

Q. Did you see anything wrong with the stairs at that time? A. No, sir, I didn't.

Mr. Eddy: You may cross examine.

Cross Examination

Q. (By Mr. Emmons): You were employed by the Commissioned Officers' Club, were you not?

A. Part time, yes. When I first started to work there I was and then I went to the yard payroll.

Q. In any event, at the time Mr. Forfari was

(Testimony of Will Hall.)

hurt that was your employer, was it, the Commissioned Officers'?

A. Yes, I was working there, but I was paid from the Navy yard.

Q. Were you paid by the Navy? A. Yes.

Q. Were you a civil service employee?

A. Yes.

Q. Mr. Sexson was your boss? A. Yes.

Q. At the time of the accident what made you aware that something had happened?

A. Somebody hollered, you know, he hollered back there for somebody to come and pick him up.

Q. Where were you? [47]

A. Right there in front cleaning up, then we all went back there.

Q. Who did you mean by all? Were there some others around there?

A. There was a couple of guys in and out. They weren't working at the time it happened.

Q. What did you do?

A. Well, I helped him up in a chair.

Q. Where was he when you first saw him?

A. Where did I see him? They had put him in a chair when I went back there.

Q. Where was Mr. Forfari when you first saw him after you heard this scream?

The Court: He said they had put him in a chair.

A. They had put him in a chair.

Mr. Eddy: I am going to object to this line of testimony, merely for the record. This is his witness, I think he should ask direct questions as to

(Testimony of Will Hall.)

this line of testimony. I have no objection to him asking these questions, but I believe he should be——

The Court: No, I believe the circumstances surrounding this he is entitled to go into. You asked him if he knew when he fell, so he is entitled to go into all the circumstances. Proceed.

Q. (By Mr. Emmons): You weren't at the bottom of the stairs [48] when it happened?

A. No.

Q. You didn't see it happen? A. No.

Q. You heard somebody scream? A. Yes.

Q. Then did you go over to the bottom of the stairs? A. No, I was back in the club.

Q. You saw two men helping Mr. Forfari?

A. Putting him in a chair, he was sitting in a chair by the door there.

Q. There was a chair there by the door?

A. Yes.

Q. In the hall or in the stairway?

A. In the hall.

Q. And you learned then that he had fallen down the stairs? A. Yes.

Q. Could you see whether he had been hurt in any way? A. No, I couldn't see.

Q. Nothing that you could observe?

A. No.

Q. Did he tell you at that time he had hurt himself any way?

A. No, he didn't say anything.

Mr. Eddy: I object to the self-serving statement, your Honor. [49]

(Testimony of Will Hall.)

The Court: The objection will be sustained. Don't answer that, Mr. Hall.

Q. (By Mr. Emmons): Mr. Hall, did those stairs always have linoleum cover on the risers?

A. You mean on each one of the steps?

Q. Yes. A. Yes.

Q. It had linoleum? A. Yes.

Q. And it had this metal strip across it?

A. Yes.

Q. And that is what held the linoleum down, is that right? A. Yes.

Q. Were they worn at all across the front part of the step while you worked there?

A. No, I don't think so.

Q. Did they look worn? A. No.

Q. They looked fresh, did they?

A. Not too fresh, but——

Q. How long did you work there?

A. I worked there about four years.

Q. And had there been any repairs to the stairs while you were there?

A. Nothing but painting. They painted the hallway. [50]

Q. And it was a part of your job, was it, to notice defects?

A. It was all my job. I lived there. I had to keep that up.

Q. You see this metal strip across here in Defendant's Exhibit A, this picture? Was that the type of metal strip that was on there about that time when Mr. Forfari fell?

(Testimony of Will Hall.)

A. There was a metal strip across there. I don't know anything about any change. That is metal across there.

Mr. Emmons: I have no further questions.

Mr. Eddy: No further questions.

The Court: All right, Mr. Hall, you may step down.

Mr. Emmons: Oh, I have one more. I forgot about the light. May I ask one more question about the light?

The Court: Yes, you may.

Q. (By Mr. Emmons): Now, you mentioned there was a light at the top of the stairs. Will you put an X where you think the light on this Defendant's Exhibit A would be, just about the position where the light was, if you can?

Mr. Eddy: Your Honor, I am going to object to that. I don't see that there is anything——

A. It is about there (indicating).

Mr. Eddy: Just a minute.

Mr. Emmons: Just a minute. There is an objection.

The Court: Can you show us on that picture where the light was, Mr. Hall? [51]

A. No, you can't see the light in the hall. It is right on the right hand side of it. There is lights all the way across the picture.

Q. (By Mr. Emmons): You mean where that X is on the picture, that is about the position it would be?

A. Right along in there. When you open the

(Testimony of Will Hall.)

door a light shines upstairs and one shines down (indicating on photograph).

Mr. Emmons: All right, thank you. No further questions.

Mr. Eddy: The government will call Mr. Patmon.

FRANK PATMON

called for the government, sworn.

The Clerk: Your name, please?

A. Frank Patmon.

Direct Examination

Q. (By Mr. Eddy): You have given us your name, Mr. Patmon. What is your address, please?

A. 142 Los Altos, Vallejo.

Q. What is your occupation?

A. I am manager of the Mare Island Cafeteria System at Mare Island.

Q. How long have you been the manager?

A. 12 years.

Q. Now, was the plaintiff in this case—do you know the plaintiff in this case, Mr. Forfari?

A. Yes, I do. [52]

Q. Was he at one time employed by the Mare Island Cafeteria System?

A. Yes, he was.

Q. When was that, please?

A. He came in 1951, in May of 1951—no, I beg your pardon, February of 1951.

Q. And how long did he work?

A. Until August 29, 1952.

(Testimony of Frank Patmon.)

Q. Well now, I believe that you have knowledge of an accident that occurred on November 21 of 1951. Was he employed by the Mare Island Cafeteria System at that time? A. Yes.

Q. And was he then absent from work for some period of time? A. Yes, he was.

Q. Until when, please?

A. He came back to work in July of '52.

Q. And then how long did he work after that for the Mare Island Cafeteria System?

A. He worked until August of that year, August 29th.

Q. Was he able to perform his work satisfactorily in July of 1952?

A. Yes, he was satisfactory.

Q. Now, what is the purpose of the Mare Island Cafeteria System? [53]

A. We are authorized——

Mr. Emmons: Your Honor—just a minute, please—I will object on the ground that calls for conjecture or a conclusion of the witness, what the purpose is.

Mr. Eddy: Well, perhaps I will rephrase it and there will be no further objection.

Q. You have been, you say, with them for 12 years? A. Yes, sir.

Q. How long have you been the manager?

A. Ten years.

Q. You are a civilian, are you? A. Yes.

Q. Has it become necessary for you to become familiar with the functions of the Mare Island Caf-

(Testimony of Frank Patmon.)

eterial System since you have been manager over the last ten years? A. Yes.

Q. Do you know the services that it performs?

A. Yes, sir.

Q. And do you know the duties of the various members of its staff? A. Yes, I do.

Q. Is it organized pursuant to regulations issued by the Secretary of the Navy or Secretary of Defense? A. Yes.

Q. Are you familiar with the regulations under which it is [54] organized? A. Yes, I am.

Q. What function does the Mare Island Cafeteria System provide at the shipyard?

A. It provides food services for the shipyard employees.

Q. When you say food services do you mean the purchase, preparation and service of meals?

A. That is right.

Q. Does it operate in more than one place or in one place only?

A. No, it operates in a number of places.

Q. How many places? At this time?

A. Well, twelve units and special services as required from time to time.

Q. Now, did it have twelve units in 1951?

A. Yes, it had more than twelve. It had about fourteen at that time.

Q. Where are the units? Where are they generally?

A. Well, they are distributed up and down along the waterfront about two miles in length and wher-

(Testimony of Frank Patmon.)

ever there is a concentration of people we have a unit.

Q. Now, are these cafeterias, largely?

A. Four cafeterias and eight canteen food services.

Q. What is the difference between the cafeteria and the canteen food service? [55]

A. We think of a cafeteria as a large building giving complete food service, equipped with a dining room and all the facilities of a large restaurant, as opposed to a canteen where it is more of a package service, sandwich, beverage service.

Q. Is hot food served at the canteen services?

A. Not hot meals. They serve such things as chili and hot sandwiches and cold sandwiches, but not a hot plate lunch.

Q. (By the Court): Isn't the distinction, if I can bring this to a head, the cafeteria is where you sell them food and they eat it on the premises and the others are where they buy it and take it wherever they want to eat it?

A. That is correct.

Q. They don't provide any space for eating in the canteens?

A. We do in some cases.

Q. Well, you have some benches or something around, but do you have a regular table service there?

A. In about half of them we do, yes.

The Court: All right.

Q. (By Mr. Eddy): At any rate, how many kitchens do you have?

(Testimony of Frank Patmon.)

A. We have one in complete operation at the present time.

Q. And the food is trucked out or carried out of the kitchen to the other places where it is consumed or vended?

A. Yes. It is delivered by truck.

Q. Yes. And you are the general manager for that entire [56] system, is that correct?

A. That is right, yes.

Q. Who is your immediate superior?

A. I have a board of directors as an advisory board, a control board, and I also have a civilian employee who is a supervisor of special services in direct line of authority of the industrial relations department.

Q. Is he a civilian also?

A. He is a civilian.

Q. Is he a member of this advisory board?

A. Yes.

Q. And to whom does he report?

A. To the Industrial Relations Officer.

Q. And to whom does the Industrial Relations Officer report?

A. The shipyard commander.

Q. And he is a Rear Admiral, is that right?

A. Yes.

Q. Is the Industrial Relations Officer Naval personnel?

A. Yes; he is a commander in the Navy.

Q. But this supervisor of special services is a civilian?

A. Yes.

(Testimony of Frank Patmon.)

Q. And he is a member of this advisory board?

A. Yes.

Q. Who appoints the advisory board?

A. The shipyard commander. [57]

Q. Does the cafeteria system operate as a profit-making organization?

A. No, it is a nonprofit organization.

Q. And I suppose it makes a small administrative profit just to make sure it doesn't have a loss, though, isn't that right?

A. Yes, that is right.

Q. And if any of this small administrative profit accumulates, what is done with that?

A. It may be used for improved food service or reduced prices, or with the approval of the shipyard commander it can be used for welfare of the employees.

Q. You say the shipyard commander must approve the use of this fund? A. Yes.

Q. Now, your advisory board is appointed by the shipyard commander. Is its actions subject to veto by the shipyard commander?

A. Yes, sir.

Q. In 1951 were you operating in the Commissioned Officers' Mess? A. Yes.

Q. Had the Shipyard Cafeteria System continuously operated kitchens in the Commissioned Officers' Mess?

A. During the life of the contract with the Commissioned Officers' Mess. [58]

Q. During the life of the contract?

(Testimony of Frank Patmon.)

A. Yes.

Q. To your knowledge did the Commissioned Officers' Mess hire its own cooks and serve its own meals at any time?

A. Not during that time.

Q. How about at this time?

A. They are operating it themselves at this time.

Q. But, in 1951 it was your responsibility, is that right?

A. Yes, food services.

Q. And how was the food services handled at the Commissioned Officers' Mess? Was that food prepared elsewhere and trucked in, or was it prepared on the premises?

A. It was mostly prepared on the premises, the Commissioned Officers' Club.

Q. But there were some occasions where you prepared the food elsewhere and brought it in?

A. Yes, there were some items of ready cooked food, in some cases.

Q. But were the cooks and waiters your employees?

A. Yes.

Q. (By the Court): Who provided you with the initial supplies, your equipment?

A. At the officers' club?

Q. (By the Court): No, in the entire Mare Island Cafeteria System? [59]

A. The government provided the buildings and the permanent equipment. Permanent equipment is identified as permanent, things like dining room tables, ranges, heavy equipment, stationary equip-

(Testimony of Frank Patmon.)

ment. Most of the portable equipment was purchased by cafeteria funds.

Q. In the event of discontinuance of this system, though, that is, dissolution of the organization, do you know what would become of the funds of the organization?

A. It would go into the general funds of the United States.

Q. Of the United States?

A. Yes, U. S. Treasury.

Mr. Eddy: Your Honor, I have another regulation, Navy Civilian Personnel Instructions, that has to do with the organization of this entity.

The Court: It is an official document?

Mr. Eddy: Yes, your Honor. It is something of which the Court can take judicial notice.

The Court: Let Mr. Emmons see it.

(The document was handed to Mr. Emmons.)

Mr. Emmons: I have no objection.

The Court: Let it be received and marked Defendant's Exhibit C.

(The document referred to was marked Defendant's Exhibit C.)

Q. (By Mr. Eddy): Pursuant to regulations, the Mare Island Cafeteria System had a contract for compensation insurance with [60] the State Compensation Insurance Fund, is that right?

A. That is right.

Q. And it was through that insurance policy that your employee, Mr. Forfari, was given compensation in this matter?

A. Yes.

(Testimony of Frank Patmon.)

Q. Did you have occasion to go into the kitchen of the Commissioned Officers' Mess and the employees' washroom during November of 1951?

A. Yes.

Q. And was that in connection with your duties?

A. That is right.

Q. Calling your attention to Defendant's Exhibit A I will ask you if you recognize it?

A. Yes.

Q. Did you use those stairs on occasion during that time? A. On occasion, yes.

Q. Did you ever notice anything defective or dangerous about them? A. No.

Q. Did anyone ever make a report to you that they considered them to be defective or dangerous?

A. No.

Q. Specifically, did your employee, Mr. Forfari, ever complain of the condition of those stairs?

A. No. [61]

Q. I believe there has been testimony that Mr. Forfari was receiving a salary of \$350 a month, is that correct? A. Yes.

Q. Just another question. The manner in which these services were performed were under your supervision, as I understand, as a civilian employee, is that right? A. Yes.

Q. Now, did the shipyard commander—he was a Navy officer, was he? A. Yes.

Q. And he is a rear admiral at this time?

A. Yes.

Q. Did he have the right to direct you to alter

(Testimony of Frank Patmon.)

the manner in which the services were performed or to discontinue them altogether?

A. He had that right.

Mr. Eddy: Thank you. You may cross examine.

Cross Examination

Q. (By Mr. Emmons): Mr. Patmon, you had a contract with the Commissioned Officers' Mess?

A. Yes.

Q. What was the nature of that contract?

A. It was to provide food services as required for the Commissioned Officers' Mess on a continuous day to day basis for an indefinite period. [62]

Q. Was that an annual contract entered into?

A. It had a cancellation clause, a thirty day cancellation clause, but it didn't have a term.

Q. Did it have anything in the contract at all pertaining to employees, the type of employees, whether they would be civil service or otherwise?

A. It didn't mention civil service. It didn't mention employees in that manner. We are not permitted to hire civil service employees.

Q. You cannot hire employees who come under the federal employees' compensation act, can you?

A. Will you state the question again?

(Question read.)

A. If I may clarify that, our employees cannot be civil service in our service. The fact that they are civil service for the government does not eliminate them from our employ.

(Testimony of Frank Patmon.)

Q. Didn't you just say that you couldn't hire that type of employees?

A. That is what I said, but the way the question was phrased lead me to believe you wanted to know whether my employees were civil service. We do not have civil service employees. I misunderstood the question.

Q. But, can you hire civil service employees?

A. The fact they are civil service doesn't concern us. They are permitted to work. [63]

Q. They could work for the Mare Island Cafeteria System?

A. That is right. Only they are not employed by the government.

The Court: What you are saying is that the mere fact a person is employed by you will not place them under civil service, but if they happen to be under civil service there was no reason why you couldn't employ them, if they are employable by you?

A. That is correct.

Q. (By Mr. Emmons): When you employ them they then lose their civil service status?

A. They do not.

Q. They do not?

A. That is true. If they work for the government and they work for me during their off duty hours that doesn't interfere with their civil service status with the government.

Q. I am not talking about off duty employees. I am talking about full time employees, such as Mr.

(Testimony of Frank Patmon.)

Forfari. If he were a civil service employee and went to work for you he would lose that status, would he not?

Mr. Eddy: If your Honor please, I object to that——

The Court: I don't know what he is getting at on this point. I think I have the situation pretty well in mind. Employees of this organization, whatever you want to call it, are not civil service employees; but if they happened to pick [64] up a civil service employee and use him, that doesn't jeopardize his rights as a civil service employee, if he can maintain it wherever he has civil service rights, but it doesn't deprive him of the right to work for him.

A. That is true.

The Court: There are a lot of those fellows down there who are working two shifts. They work over at the ship yard on the swing shift and then they come over and work some where else.

A. That is right.

The Court: All Mr. Patmon was saying was that just because a man was a civil service employee didn't keep him from employing him if he could use him.

Am I right on that or am I wrong?

A. That is right.

Mr. Emmons: But, my point is suppose a man only had one job, and this was the job.

The Court: Well, that is why I said it doesn't make any difference, because the civil service doesn't enter into it in this service here at all. We

(Testimony of Frank Patmon.)

are talking about things now that are hypothetical or perhaps academic.

Mr. Emmons: All right, your Honor.

Q. Do you have a copy of that contract? Do you have a copy of the contract?

Mr. Eddy: No, I don't have it here. I will be glad to provide it, however. [65]

Mr. Emmons: I would like to put it in the record.

Mr. Eddy: If it is still in existence. I haven't asked Mr. Patmon. Will you ask him?

Mr. Emmons: Is that contract still in existence?

A. Yes, counsel; I have a copy.

Q. Do you have a copy? A. Yes.

Mr. Eddy: You don't have it with you, do you?

A. Yes.

Mr. Eddy: Oh, do you?

Mr. Emmons: May we have the copy now, please?

The Court: Which contract are you talking about, the contract with the officers' club?

Mr. Emmons: Yes, with the officers' club.

(The document was produced.)

Mr. Emmons: We will offer this, if your Honor please, on behalf of the plaintiff as next in order, that contract.

The Court: That is your first exhibit. Let that be marked Plaintiff's Exhibit 1.

(The document referred to was marked Plaintiff's Exhibit No. 1.)

Q. (By Mr. Emmons): You mentioned that the

(Testimony of Frank Patmon.)

initial supplies and the equipment that were obtained by this cafeteria service was obtained from the Navy. That is the building and the permanent equipment. [66] A. Yes, sir.

Q. All other equipment you purchased from the profits of the organization?

A. Not all of them, most other equipment.

Q. What other was there that you didn't get from the profits?

A. There might be money provided for certain things. For example, an additional bake oven or an additional mixture or slicer on occasions.

Q. Where did you get that?

A. I beg your pardon?

Q. Who provided that?

A. The government provides such things when the money is available.

Q. Mr. Patmon, I will show you here a copy of the state compensation insurance fund contract of insurance, workmen's compensation insurance, and ask you if you recall this and if that is a true and correct copy of the insurance at the time of Mr. Forfari's injury?

A. It seems to be. I don't recognize it as an individual document, but it seems to be, yes.

Q. That is the type of contract you had at that time? A. Yes.

Q. Now, with particular attention to this endorsement that is on there, do you recall that endorsement? A. Yes, I do. [67]

Q. At that particular time there was some ques-

(Testimony of Frank Patmon.)

tion as to whether or not the employees hired by you were federal employees or state, is that correct?

A. No, there wasn't a question. We were never considered state employees—well—we came under the state compensation law, but we were always more or less government employees.

Q. You mean you came under the state workmen's compensation act of the state of California, but you were still government employees?

Mr. Eddy: I am going to object as argumentative and actually this is right at the heart of one of the government's contentions here.

The Court: I will sustain the objection on the ground it calls for a conclusion of this witness on a legal question.

Q. (By Mr. Emmons): But, nevertheless, this endorsement was a part of the contract of insurance which you took out with the State Compensation Insurance Fund, is that correct?

A. Yes, that is right.

Mr. Emmons: May I offer this in evidence, if your Honor please,——

Mr. Eddy: May I see that again?

Mr. Emmons: ——as plaintiff's exhibit next in order?

Mr. Eddy: Just a moment.

Mr. Emmons: I will give you a copy of it.

Q. (By the Court): There isn't any doubt in your mind that that or a similar policy to that was in effect at the time of this [68] accident, is that right, Mr. Patmon?

(Testimony of Frank Patmon.)

A. There is no doubt.

The Court: I am going to admit it in evidence as Plaintiff's Exhibit 2 for what value it may have.

It is the hour of noon. We will take a recess at this time to the hour of 2:00 p.m.

Now, are you going to have any more witnesses, Mr. Eddy?

Mr. Eddy: Well, may I go back one paragraph and interpose an objection to this document?

The Court: Well, I don't know if it is worth anything, but I am going to let it come in for what it is worth and then I will take it into consideration. No harm can be done by it, and if there is any good can come from there they are entitled to have it. At the moment I don't know what can come from it, but it is up to them to show me.

Mr. Eddy: Do you have a copy for me, you say?

Mr. Emmons: Yes.

The Court: How about your evidence, Mr. Eddy?

Mr. Eddy: This is my last witness and I don't think I have any more questions to ask him.

The Court: What about you? Do you have any more evidence?

Mr. Emmons: No, your Honor.

The Court: Well, then, we will take the adjournment till 2:00 o'clock, and I want you gentlemen to get yourselves oriented so you can argue when you complete the evidence, and [69] then we will have the matter ready for submission on this stage of the case.

Mr. Emmons: Yes.

The Court: All right, that will be the order.

(Thereupon an adjournment was taken until
2:00 p.m. this date.) [70]

Afternoon Session

Wednesday, October 24, 1956, 2 p.m.

The Court: I believe, Mr. Patmon, you were on the stand at the time of the recess.

Mr. Eddy: I don't have any further questions, your Honor.

The Court: I thought you had more questions?

Mr. Eddy: No, your Honor.

The Court: You said you had no more.

Mr. Emmons: No, I have no further questions.

The Court: Then I was mistaken. You are through your cross examination?

Mr. Emmons: Yes.

The Court: Is the testimony on this phase of the case in, then?

Mr. Emmons: Yes, your Honor, as far as I am concerned.

Mr. Eddy: No rebuttal, your Honor.

(Testimony closed on issue of liability.) [71]

Friday, September 13, 1957, 10 a.m.

The Clerk: Case No. 6772, Forfari v. U. S., further trial.

Mr. Emmons: Ready, your Honor.

Mr. Woodward: Ready, your Honor.

The Court: You may proceed.

Mr. Emmons: Doctor Silbermann, will you take the stand.

DR. COLMAN SILBERMANN

called for the plaintiff, sworn.

The Clerk: State your name, please.

A. Colman Silbermann.

Direct Examination

Q. (By Mr. Emmons): Doctor, will you state your full name for the record, please?

A. Colman Silbermann.

Q. And where do you reside, Doctor?

A. 1280 Pine Street, San Francisco.

Q. And what is your business or profession, please?

A. Physician and surgeon.

Q. And where is your office located?

A. 995 Market Street, San Francisco.

Q. And are you licensed to practice medicine in the State of California? [72]

A. Yes, sir.

Q. And how long have you been so licensed?

A. Since 1914.

Q. And what——

Mr. Woodward: If the Court please, we will stipulate to the doctor's usual qualifications.

Mr. Emmons: Thank you.

The Court: Very well.

Q. (By Mr. Emmons): Now, Dr. Silbermann, you know Mr. Forfari professionally, do you?

A. Yes, sir.

Q. And will you tell us when you first saw him?

A. I first saw him in my office on June 19, 1952.

Q. And on that occasion did you examine Mr. Forfari?

A. I took a history from him and examined him.

(Testimony of Dr. Colman Silbermann.)

Q. And will you tell us at this time what the history was and what your examination revealed.

A. He was injured on November 21, 1951, and, briefly, he tripped on a metal step tread and fell about nine steps, landing on his back and twisting his left ankle.

There was no head injury, he was not unconscious. There was immediate severe pain in the left ankle, with some pain, which was not too severe at that time, in the lower back.

He was helped up by other employees and taken to the dispensary at Mare Island. [73]

X-rays of the left ankle showed a fracture.

He was moved to the Vallejo General Hospital by ambulance where he came under the care of Dr. Hoops.

A plaster of paris cast was applied extending from the toes to below the knee, without anesthetic.

He was in the hospital four days. He was on crutches for about four and a half months. The cast was worn for about six weeks and was replaced by a second cast with a walking iron which he wore for about four weeks.

He was in bed at home for about a month after he left the hospital, except for visits to Dr. Hoops' office about once a week, while wearing the cast.

After that he received diathermy treatment twice a week to the ankle and some diathermy treatment to his back.

The back was painful after he was injured and it

(Testimony of Dr. Colman Silbermann.)

bothered him increasingly and became worse about two months after he was injured.

The Court: Doctor, I missed something. You said he was in the hospital four days and something four and a half weeks. I missed that.

A. Four and a half months, your Honor.

Q. Four and a half——

A. He was on crutches four and a half months.

Q. On crutches. I am sorry. Thank you.

A. He was examined by Dr. Terwilliger — this was in [74] connection with his compensation injury, he was injured at work, but he was not treated by him.

At the time that I saw him, which was June 19, 1952, about eight months from the date of injury, he had not yet returned to work. His reasons that he gave me were that he had to stand, prolonged standing for 48 hours a week and he didn't think he could do it.

At that time he was 75 years of age.

Going into his previous history, he fractured his left hip and pelvis some thirty years before in an automobile accident. Thereafter the hip has been stiff.

Twelve years previous to the date of my examination a right inguinal hernia was repaired.

There was no history of other disability.

At the time that I saw him first he complained of pain, stiffness and swelling of the left ankle, worse on much weight bearing. The pain varied from dull aching to sharp, according to his activities. It was

(Testimony of Dr. Colman Silbermann.)

on the other side of the ankle, often extending up the leg into the knee.

He further complained of pain, stiffness and weakness of the back. The pain was constant, and also varied from dull aching to sharp, depending on his activities, and was in the middle and on each side of the lower back. It is worse on coughing and sneezing and in cold and damp weather, and other activities, such as bending, twisting and stooping or in [75] walking or lifting. Prolonged walking or standing also aggravated the ankle pain.

He said he had occasional pain in the knees.

There was no radiation of pain into the lower limbs from the back. He merely complained of weakness of the back and increasing pain on lifting, which he avoided as much as possible.

Sleep is often disturbed by pain in the back and left ankle. On arising his back felt about the same as on retiring.

I made a complete examination at this time. He is a small, cooperative, intelligent individual; I did not think he looked his age. Height, five feet four; weight, 138 pounds.

The general examination presented no abnormalities. His pupils were equal and reacted O.K. to light and distance.

The teeth were in poor condition; uppers replaced by a denture.

Tonsils small and buried. Heart and lungs clear. Blood-pressure, 150 over 95.

Abdomen negative.

(Testimony of Dr. Colman Silbermann.)

He walks without a cane and wears no support to his back or to the left lower limb. He walks with a left-sided limp with or without his shoes on, and there is an obvious shortening of the left lower limb from the pre-existing hip fracture.

He stands in poor posture; there is more weight carried [76] on the right lower limb than on the left.

There is a moderate upper dorsal kyphosis, curvature, there is a lateral curvature, convex to the right and reversed in the lumbar region. No muscle spasm noted at that time.

Palpitation over the lumbosacral articulation and the adjacent muscles on each side caused pain.

Forward bending is done slowly, with complaint of low back pain, with his fingertips eight inches from the floor.

He regained the erect position fairly readily and complained of less pain than in forward bending.

Extension, lateral bending and rotation to right and left are all painful and restricted about 25 per cent. There is no motion in the left hip, which is held flexed at an angle of 35 degrees.

He was unable to squat or kneel.

The Achilles reflexes were sluggish. Other reflexes equal and active.

The left foot, ankle and lower half of the leg were moderately swollen. There were moderate varicose veins in both legs. Alignment of the left leg was O.K. Palpitation caused complaint of pain on the outer side of the left ankle.

(Testimony of Dr. Colman Silbermann.)

Both feet were moderately pronated or flattened, normal in color, equally warm. Arterial pulsation felt in both feet. No crepitus in the ankles. [77]

He was unable to rock from heel to toes and back completely and without pain.

I made a series of comparative measurements of both legs and ankles:

Circumference of thigh six inches above patella, the knee-cap: On the right side 18 inches, on the left side $16\frac{1}{2}$.

Circumference of leg six inches below the knee-cap, $13\frac{1}{2}$ inches on the right, 14 on the left.

Circumference of the ankles, 10 inches on the right, $10\frac{1}{2}$ on the left.

Circumference of foot, $8\frac{3}{4}$ inches on the right, $9\frac{1}{4}$ on the left.

Dorsiflexion of the ankle, turning the ankle upward: 90 degrees on the right, 85 on the left.

Plantar flexion, or bending the ankle down, 50 degrees on the right, 50 degrees on the left.

Eversion, turning the ankle out, 15 degrees on the right, 10 on the left.

Inversion, turning the ankle in, 30 degrees on the right, 25 on the left.

The right lower limb was an inch and a quarter—I will put it the other way: the left lower limb was an inch and a quarter shorter than the right. The right measured $33\frac{1}{2}$ inches, and the left $32\frac{1}{4}$.

At the time that I examined him there were certain medical reports available in connection with his compensation that I reviewed, and I had X-ray

(Testimony of Dr. Colman Silbermann.)

films made in my office of both his back and his left ankle, which I have here.

The films of the lower back show fairly marked arthritic changes in the bodies of the lumbar vertebrae. No fracture. Some calcification of the abdominal aorta and pelvic vessels is noted. There is a healed, oblique fracture of the fibula, the outer bone of the leg, just above the ankle-joint, with some thickening of the bone, with the fragments of the fracture in good position.

Q. (By Mr. Emmons): What conclusion did you——

A. The conclusion that I arrived at was that the man had sustained an oblique fracture of the lower end of the left fibula and a sprain of the lower back, with findings at the time of my examination pertaining to the lumbosacral articulation and adjacent lower lumbar muscles bilaterally.

I did not believe he needed further treatment at that time, neither did I think his status was permanent or stationary at that time; it was too early.

I did not believe the old left hip fracture or arthritis are prolonging the disability. The fracture of the hip was 30 years old. These conditions pre-existed the date of the injury and did not prevent him from working.

Q. Now after that did you again see him on December 9, [9] 1955, Doctor?

A. No, that's the date of the report. November 29th.

Oh, I see, that's right.

(Testimony of Dr. Colman Silbermann.)

A. Yes, I did. I examined him in my office.

Q. And did you again examine him?

A. I took his interim history from when I had last seen him in June, '52.

Q. Will you tell us what that history was?

A. He told me that in July of '52 about a month after I had seen him he worked for four weeks as a chef, but had done no other work.

The Court: What was that date in '55 that you saw him, Doctor?

A. On November 29, your Honor, 1955. I hadn't seen him since the date of his examination.

He had worked four weeks as a chef and no other work.

In February 1954 he developed some urinary trouble—or, rather, he consulted Dr. Hebert of Vallejo. He had had some urinary trouble of long standing. In March of 1954 Dr. Hebert operated on his bladder under spinal anesthetic. He was in the Vallejo General Hospital for two weeks. He told me the operation did not help him.

In April of '55 a second bladder operation was performed under spinal anesthetic in Vallejo General Hospital by Dr. Hebert. He spent two weeks in the hospital again. Two herniae [80] on the left side were repaired and he said the second operation did help him.

He further gave a history of having had asthma for several years, usually appearing at night.

The left hip condition was not changed. He said it was stiff for about 30 years.

(Testimony of Dr. Colman Silbermann.)

Well, this is somewhat of a recapitulation of the history of the original one, because——

Q. Did he tell you at that time whether the condition of the lower back and left ankle had become better or worse?

A. As far as the ankle, he said his left ankle swells, feels weak and is painful. Motions are restricted. Pain and swelling are worse on much weight-bearing, again varying from dull aching to sharp according to his activities, and the pain is constant. It is on the outer side of the left ankle and extends up the leg into the knee.

Constant pain in the middle and on each side of the lower back, varying from dull aching to sharp according to his activities. Aggravated by the same conditions as before,—bending, twisting, lifting, cold and damp weather, coughing and sneezing.

He didn't know how much he could lift, because he avoided lifting, because his back felt weak and lifting aggravated the pain.

Sleep is often disturbed by pain in the back and ankle. [81] Feels about the same on arising as on retiring.

He gets up at night three or four times to urinate.

He was still seeing Doctors Hebert and Schmutz, who were the two doctors who operated on his bladder, and he saw them four or five days prior to my second examination.

I again re-examined him, and the general exam-

(Testimony of Dr. Colman Silbermann.)

ination presented no particular change. His blood-pressure was 145 over 95.

Q. Doctor, may I interrupt? The first time you examined him his weight was 138 pounds, I believe.

A. Yes.

Q. And on the second examination his weight was 119.

A. Yes, it had dropped to 119. I weighed him in the office. And his blood-pressure was roughly about the same, 145 over 95.

There was no abnormality of the neck, motions were painless and free. No deformity, no muscle spasm, no tenderness on palpation of the neck.

He had a healed 3½ inch linear scar in the lower abdomen, in the mid line, and a second one three inches in length parallel on the left side of the lower abdomen. These were the two scars of the operative procedure.

His reflexes were equal and active, except his Achilles' or heel reflexes were sluggish.

He walks without a cane, has a marked left-sided limp [82] with or without his shoes on.

Shortening was still noted in the left lower limb, due to the old hip fracture.

He has poor posture; carries more weight on the right lower limb than on the left.

The curvatures previously noted, the lateral curvature and the dorsal curvature or kyphosis, are still present.

No other abnormal bony prominences of the spine. No muscle spasm.

(Testimony of Dr. Colman Silbermann.)

Complained of pain on palpation over the lumbosacral articulation and adjacent lower lumbar muscles on each side.

He was able to forward bend to 10 inches this time as against eight on the previous examination. This motion was done slowly with complaint of low back pain. The erect position was recovered fairly readily and with less pain than in forward bending.

The other motions of the back,—extension, lateral bending and rotation to right and left, were painful and 25 per cent restricted.

The same flexion angle of the left hip of 35 degrees was noted, with no motion in the hip.

He was unable to kneel or squat. I had to help him remove and replace his shoes and socks.

The varicosities are still present in both legs. No restriction of muscle power in the lower limbs. [83]

Alignment of the left leg is good. There is a moderate swelling of the left foot, ankle, and lower half of the left leg, with pain on palpation over the outer side of the left ankle.

Arterial pulsation is felt in both feet. The feet are equally warm, normal in color, and moderately and equally pronated or flattened.

No crepitus in the ankles.

He was unable to rock from heel to toes and back completely with the left foot, or without complaint of pain.

I again checked his comparative measurements. On the right side, circumference of thigh six inches above the patella, $16\frac{3}{4}$ inches, the left $15\frac{1}{4}$ inches.

(Testimony of Dr. Colman Silberman.)

Circumference of leg six inches below the patella, ten inches on the right, eleven on the left.

Circumference of the ankle, $9\frac{3}{4}$ on the right, 10 inches on the left.

Circumference of the foot, $8\frac{1}{2}$ inches on the right, $9\frac{3}{4}$ on the left.

Dorsiflexion of the ankle,—bending the ankle upward,—right 90 degrees, left 85.

Plantar flexion, downward, right 50 degrees, left 50.

Eversion,—turning the ankle out,—15 on the right, 10 on the left.

Inversion, or inward motion, 30 degrees on the right and [84] 25 on the left.

The same shortening of an inch and a quarter was noted of the left lower limb.

And I didn't have any more X-rays taken at that time.

My conclusion at that time was that the man had sustained an oblique fracture of the lower end of the left fibula and a sprain of the lower back November 21, 1951.

The findings at this examination pertain to the lumbosacral articulation and the lower lumbar muscles on each side. No further treatment was indicated. He is unable to work. His status from these injuries is permanent and stationary. The residual factors are pain in the lower back, increased on exertion, restriction of motions, weakness of the back, tenderness on palpation and presence of a back vulnerable to future trouble.

(Testimony of Dr. Colman Silbermann.)

As far as the ankle injury, the residual factors are pain and swelling, increased on much weight bearing, limited motions, and tenderness on palpation.

I made a comment about his non-industrial condition, which was a shortening of the left lower limb, some varicosities, absence of motion in the left hip, and urinary frequency and asthma unrelated to any accident. Some of the atrophy of the left lower limb I concluded could have resulted in part from the recent injury and some from the fracture 30 years before. [85]

Q. It is your conclusion and was at that time, Doctor, that this disability that he has is permanent and total?

A. Permanent and partial. He is not completely——

Q. Yes.

A. Permanent and partial. It is stationary, which is described as partial.

Q. Did you again examine this man at my request?

A. Yes, I examined him on August 28th of this year.

Q. He is now 81 years of age. Could you tell me whether or not there are any changes, any significant changes so far as his physical condition is concerned?

A. Subjectively, I went over his complaints, and subjectively I have a note here; his complaints have not varied particularly since I last examined

(Testimony of Dr. Colman Silbermann.)

him. In short, he says he has to be careful because of weakness in the left ankle not to fall, as the ankle tends to fold. Occasionally pain in his back and ankle keeps him awake at night. Does not believe he can lift over 15 pounds without increasing his back pain.

I re-examined him, and his condition is essentially about the same.

I have some more measurements. He weighs 118 pounds, blood pressure is 140 over 90.

The comparative measurements of the ankle were the same. The circumferential measurements, on the right of the thigh six inches above the patella, 17 inches; on the left $15\frac{3}{4}$.

Of the leg six inches below the patella, $10\frac{1}{2}$ on the [86] right, 11 on the left.

At the eight inch level below the patella, $9\frac{1}{2}$ — $9\frac{1}{4}$ on the right and $9\frac{1}{2}$ on the left.

Ankle measurements, circumference of the ankle, right 10 inches, left $10\frac{1}{4}$.

Circumference of the foot, $8\frac{1}{2}$ on the right, $8\frac{3}{4}$ on the left.

The other measurements were the same, on motion.

Q. Now, Doctor, did he also at this last examination inform you that he worked?

A. He went to work the 2d of April, he said, of '57, at a small place where he worked as a chef in the country.

Q. Now, in your opinion, Doctor, from the times that you have examined this man and have seen him

(Testimony of Dr. Colman Silbermann.)

over a period of years, would you say that his condition now—Strike that. Would you say that his injury was the cause of his present disability?

A. Yes, I think so. Of course, he is getting up in years, but there is nothing else that I can attribute it to. He is in good physical condition as far as his general health is concerned. He is 81 years old; he has a very good blood pressure. He has some arthritic changes in his spine, as shown by the X-ray films; but prior to this accident he worked, and I don't think it is of any importance in causing him to remain away from work. He is at the age where he could easily [87] have a lot more arthritic changes than show in the X-ray films. So I think that is incidental.

The reason, in my opinion, that he was away from work, excluding these operative periods that he had these two operations, would be because of his accident.

Mr. Emmons: Thank you, Doctor. I have no further questions, your Honor.

The Court: Mr. Woodward?

Cross Examination

Q. (By Mr. Woodward): I believe, Doctor, that you mentioned finding a varicose condition of both legs? A. Yes.

Q. And isn't it a usual symptom of varicose conditions that there is swelling in the lower extremities?

A. Frequently. These varicosities are not par-

(Testimony of Dr. Colman Silbermann.)

ticularly marked. He doesn't have swelling in the good leg. Sometimes varicose veins if they are marked, or frequently they will be excessively swollen.

Q. And it is also frequent, is it not, that there will be a more marked swelling in the varicose condition of one limb as compared to the other?

A. Well, first of all, he doesn't have marked varicose veins; and secondly I think that if a man has varicose veins of equal degree in both legs you would expect to find the same amount of swelling.

He had a job where he was standing working 48 hours and standing most of the time. I didn't think that the swelling was of too much importance. In fact, the comparison shows that the swelling is always on the left side.

Q. Well, that is often normal in varicose veins——

A. I examined him and I didn't see any reason to attribute it to anything else but the fracture. I would say that the varicose veins could be considered, but as long as there was no particular swelling on the right side, I am concluding that the swelling is largely due to the fracture. After a fracture in a limb it is quite common—in a leg, rather, it is quite common to get swelling.

Q. Yes. But to answer my question, it is also quite common in a varicose condition to have one leg swell more than the other and one leg to give more difficulty than the other?

A. I wouldn't say that unless the varicose veins were more marked in one leg than in the other.

(Testimony of Dr. Colman Silbermann.)

Q. But it is possible? A. How is that?

Q. It is possible?

A. If a man has a marked degree of varicosity in one leg and a minor degree in the other, I would say in the leg with the marked degree you would expect some swelling in it, yes. But this man has them both of about the same degree and neither [89] of them is very bad.

Q. I believe you stated in the course of your direct examination that Mr. Forfari limped due to the 30 year old injury, is that correct?

A. Yes, I think so; due to the shortening. He has one leg an inch and a quarter shorter than the other.

Q. And wouldn't that also put a strain upon his back in normal activity?

A. It does to a certain degree, yes. And he has these curvatures which nature brings about when one leg is shorter than the other, and in part—I don't think I should overlook the fact that this man hurt his back. At the same time he has one leg shorter than the other and that is productive of some curvatures in nature's attempt to have the man keep his balance.

Q. Isn't it also true that where a person has got a question of these natural curvatures that there is a potential of pain in the back and a great possibility of having discomfort?

A. Well, I will have to go along with him and take his credibility on it as being a fact. He told me that for many years he had no back trouble. It is a fact that many people have curvatures in

(Testimony of Dr. Colman Silbermann.)

their spine and they never have any trouble from it. Many people have arthritic changes in their spine and don't know it until some doctor takes X-ray pictures. [90]

This man has a pretty good work record, and he tells me that he hadn't had back trouble before.

Q. Do you see any connection between the later bladder difficulties in 1954 and the 1951 accident?

A. No, that is something which did not have anything to do with it.

Q. Isn't it also possible that some of his back pain could be attributed to the urinary difficulty?

A. Well, the man fell down stairs and hurt his back. I didn't see any reason to go look for something else. The man gave me a clean cut story of having no back trouble. It is a fact that during urinary difficulty there may be back ache.

Q. In fact, that is one of the common symptoms, is it not, of urinary difficulty, in the bladder and the kidneys, that there is back pain?

A. Frequently. But again I have to say that the man didn't give me any history of having trouble with his back.

Mr. Woodward: I have no further questions, your Honor.

Mr. Emmons: I have no further questions.

The Court: Doctor, just a couple of questions: As I understand it you found, either objectively or subjectively, evidence of two injuries that you attribute to this accident, the back and the left ankle.

A. Yes, your Honor.

(Testimony of Dr. Colman Silbermann.)

Q. Now will you tell me what, if anything, you found objectively in connection with the back injury?

A. Well, he has restriction of motion; he has complaint—many people contend that restriction of motion is a subjective complaint and can be simulated. On three examinations his restriction of motion was about the same, and his tenderness over one area, the lumbosacral articulation, and I consider those both are objective findings. Over a period of several years they remained about the same.

Q. And you as a medical man felt with reasonable certainty that that couldn't be in any way attributed to the injury to the hip 30 years ago?

A. No. It is in a different area, your Honor; the lumbosacral is in the middle of the back, and of course the hip is——

Q. I understand that, but I understand that the breaking of the hip brought about a curvature of the spine, and that takes in the lumbar area, does it not?

A. The curvature of the spine, I think, is the result—is not the result of the accident, but is the result of nature's method of having him walk a little bit better in keeping his balance because of the shortening of the left lower limb. Those curvatures were not caused by the accident.

Q. You mean the accident of '51.

A. Yes. [92]

(Testimony of Dr. Colman Silbermann.)

Q. I assume that some accident caused that breaking of the hip 30 years ago.

A. He had an automobile accident, yes.

Q. But you do not attribute the curvature of the spine in any way to this accident that occurred in '51?

A. No. I think that is a compensatory curvature which you get in people with shortened limbs or fractures of the hip and so on.

Q. Now, then, as a medical man it is your opinion, with reasonable certainty, then, that there is nothing about that hip injury and the curving of the spin, nature's curving of the spine, which would attribute to his subjective or objective, either one, complaints at this time?

A. No, I think not, because the man gave me a history of no previous subjective complaints, a good work report, and no back trouble. So I don't think they were productive of anything at all outside of what you could see; he had a stiff hip and curvature of the back. But I don't think they were productive of pain in the lumbosacral area.

Q. Was there anything besides pain that grew out of this back condition, as far as you can tell?

A. He has restriction of motion.

Q. What effect did that restriction of motion have upon his normal activities?

A. Well, he isn't able to bend in various directions as [93] well as he used to. His back, he contends, is also weak and he is unable to lift as much as he used to without aggravating his back pain.

(Testimony of Dr. Colman Silbermann.)

Q. Well, then, passing on to the left limb, I was rather interested. Apparently in every one of the three examinations that you made there was an atrophication of the left thigh.

A. There was some atrophy of the thigh, yes.

Q. Yes. On the other hand, there is a swelling of the lower extremity.

A. Swelling of the part below the knee.

Q. What do you attribute the atrophication of the thigh to?

A. Well, the atrophy of the thigh is at least in part due to the old injury, because of the fact that the fracture of the hip was a serious condition; but I think if you get a fracture of the ankle or a fracture of any portion of the leg you also get atrophy, and I think some of it can be attributed to the fracture of the ankle. I don't know how much. I think he had some before.

Q. Well, that is what is bothering me about this matter. What is there about this condition that would cause atrophy of the thigh and a swelling of the lower limb? When I say "this condition," I am speaking about the broken ankle. I am not interested in the hip, you understand. A. Yes.

Q. What is there about this broken ankle that would bring about atrophication of the thigh and swelling of the lower extremity?

A. Well, I think when you have a fracture anywhere near a joint, in practically nearly every case of fracture near a joint will be followed by swelling, especially in the lower limbs, because of circu-

(Testimony of Dr. Colman Silbermann.)

latory change from immobilization in plaster of paris and non-use. Atrophy, of course, also follows from non-use. The man favors it. Even now on the last examination he says he has to be careful because the ankle tends to fold on him.

Q. What did you find there to justify that complaint, if anything?

A. He had some restriction of motion of the ankle; still has.

Q. Well, does that come from the swelling or does that come from the fracture?

A. It comes from the fracture. A fracture of a joint involves not only the bone but the ligaments of the joint, and in a fracture such as he had the outer ligaments, the external ligaments of the ankle would be torn, necessarily, because of the site of the fracture.

Q. Well, now, was this fracture in the joint itself?

A. I have the films here, your Honor. I can show you.

Q. I don't care; your word is good enough for me. I have [95] to depend upon you. I wouldn't know anything about those films if I saw them, except maybe I might be able to see something there that was pointed out.

A. The fracture is in the lower portion of this outer bone, the fibula, and reaches into the joint—now I never saw the original films. The pictures I had were taken several months after the accident and the fracture had healed. But the roughening

(Testimony of Dr. Colman Silbermann.)

extends into the joint, so the presumption is that the fracture extended into the joint.

Q. In other words, on your films there is some roughening of the ball, so to speak, the joint ball——

A. The socket.

Q. The socket.

A. The socket is irregular and necessarily the articulating cartilage is damaged. I mean if a man gets a fracture into a joint, that joint is covered with cartilagenous material, and if the fracture extends into the joint the joint is roughened and the cartilagenous material is damaged, it doesn't heal smoothly any more.

Q. And you found that condition to exist?

A. You can see it in the films.

Q. In other words, I assume that is somewhat like bursitis, where you get a rough surface on one of the muscles and they work together and sort of act like sandpaper on one another?

A. It is somewhat similar, except that the bursitis, the common one that you see around the shoulder, is away from the [96] joint.

Q. I realize that. It is the effect of the formation of calcium on one of the muscles, to use the lay term?

A. That is right. To put it as briefly as I can, to try to put it in lay language, the joint is coated with smooth, oily material, called articulating cartilage, and all over that is a thin, oily material called synovial fluid, and when a man has a fracture into a joint that thin, smooth, frictionless area is

(Testimony of Dr. Colman Silberman.)

changed. The idea is that the joint moves without any friction, without any noise, and this thin, smooth, easy moving joint is disturbed.

Q. It is something like if you had a cracked bearing in an automobile.

A. The same thing, your Honor.

Q. Until such time as the bearing is replaced—unfortunately, nature hasn't provided any replacement for joints—I guess I have to back up on that: there are some instances where I think surgeons have replaced them, but generally speaking, such conditions continue with us for the rest of our lives.

A. That is right, your Honor. And I think another thing is this man is always going to stay that way, because of advanced years. It might be in a man of 20 the recovery is more rapid; but at his age I am sure it will continue.

Q. Well, I suppose that goes back to the condition of the bones; when we are younger the bones are a little softer, whereas [97] when we get along in years they become more solid.

A. That is right, your Honor, and there are changes also, at his age, in the arteries.

The Court: Anything else, Mr. Woodward?

Mr. Woodward: I would *would* to ask just one question: Doctor, would you call this a simple fracture?

A. Yes, I would say it is a simple fracture. I don't know what you mean by the term, but it is a simple—it is not a comminuted fracture, in several

(Testimony of Dr. Colman Silbermann.)

pieces, it is not a compound fracture where the bone came through the skin; to that extent. It isn't so simple in its after effect, but it is what is medically called a simple fracture.

Q. (By the Court): As I understand it, Doctor, you doctors recognize three different kinds of fractures: a so-called simple fracture, which may be a very complicated one practically——

A. That is right.

Q. ——but nevertheless it is one where there is simply a fracture of the bone; and a comminuted fracture where the bone has been broken into pieces; in other words, it is like breaking a mirror; and a compound fracture where the bone comes through the skin.

A. That is right. A simple fracture might not be a simple fracture in lay terms. It is simply one of the types of fractures. [98]

Q. Sometimes simple fractures are more troublesome than—well, certainly, than compound fractures? A. They can be.

Q. Comminuted fractures, of course, have their problems because of the disintegration of the bone.

All right, then, Mr. Emmons, do you have anything else?

Mr. Emmons: I have no further questions.

The Court: Mr. Woodward?

Mr. Woodward: No, your Honor.

Mr. Emmons: May this witness be excused, your Honor.

Mr. Woodward: No further questions.

The Court: The doctor may be excused.

Mr. Woodward: Yes.

The Witness: Thank you.

The Court: All right, you may be excused, doctor.

Mr. Emmons: Counsel, do you want any of these X-rays?

Mr. Woodward: If you don't mind. Since we have planned Mr. Forfari's examination this afternoon it might be well to have them.

The Court: Well, why don't you just stipulate that they can be left here, because if you mark them then you have the problem of getting them in the hands of the Clerk and getting them out of the hands of the Clerk.

Mr. Emmons: Let's just leave them here so the doctor can use them and then I will take them back to Dr. Silbermann. Is that all right? [99]

Mr. Woodward: That is quite agreeable, your Honor.

Mr. Emmons: Mr. Forfari. [100]

FERNANDO S. FORFARI

the plaintiff, recalled in his own behalf, previously sworn.

Direct Examination

Q. (By Mr. Emmons): Mr. Forfari, do you recall the accident of November 21, 1951?

A. Yes.

Q. And at that time you fell down the stairs in question?

A. Yes.

(Testimony of Fernando S. Forfari.)

Q. And as I recall the evidence, some employee helped you up, is that correct?

A. Yes, a fellow picked me up.

Q. Now, at that time did you feel any pain?

A. Yes.

Q. Tell us where you felt the pain?

A. In my ankle and my back. (Indicating.)

Q. Your left ankle, you pointed to your left ankle, is that right? A. Yes.

Q. Now, where did they take you from your place of employment?

A. They take me to the infirmary there.

Q. On the Naval base?

A. Yes, on the Naval base.

Q. And there what did they do for you?

A. They told me they can't put me in the hospital because [101] I work for the coffee shop, not for the government.

Q. Then where did they take you?

A. Take me down to the general hospital at Vallejo.

Q. While you were there in the Vallejo hospital, what did they do for you?

A. They take X-rays and put on a cast.

Q. A cast on your left leg?

A. A cast, yes.

Q. How long was the cast?

A. Oh, about—the first cast I had, was about six weeks, and the second one I had about four weeks.

(Testimony of Fernando S. Forfari.)

Q. You had two casts at two different times, is that right? A. Yes.

Q. Can you describe the length of the cast, I mean? Where did it extend, start and end?

A. The first one went well up to here (indicating).

Q. To the knee?

A. The knee, yes, my knee, almost. And the other one was lower.

Q. When you had this cast on your left leg were you able to walk around?

A. I used two crutches, you know?

Q. You used crutches? A. Crutches, yes.

Q. How long did you use the crutches? [102]

A. Oh, about five weeks. I don't remember just exactly.

Q. Did you use crutches all during the time you had the cast on? A. Yes.

Q. Did you have to use crutches after you took the cast off? A. Yes.

Q. For how long?

A. Four or five weeks, I guess.

Q. Was it necessary to use a cane after that?

A. Well, I used a cane because I was afraid to walk, you know, tumble down. I used a cane for quite a while.

Q. After this accident did you return to the cafeteria to work for a short while?

A. Yes, I worked, I think it was about four weeks, something like that.

(Testimony of Fernando S. Forfari.)

Q. Did you finally quit there, were you forced to quit there?

A. I told the manager, "I have to quit because I can't stand it, this is too much to stand up here."

Q. Were you working a 48 hour week then?

A. Well, it is eight hours work.

Q. A day?

A. Yes, but you get a half an hour when you eat, see; you get breakfast, a half hour, and another half hour for lunch; so it makes about seven hours working standing up. [103]

Q. Standing up on your feet?

A. Yes, I have to stand up there.

Q. Did you have pain during this time you were working? A. Oh, yes.

Q. Where was it located?

A. I had pain across my back and the ankle there, because the concrete floor is pretty hard to stand up in there.

Q. Did you at that job prepare all of the food?

A. I prepared some food, yes.

Q. In other words, you acted as the chef?

A. There was three cooks there to prepare, because there is quite a lot of people, you know, about five or six hundred people to eat.

Q. During that time you were working there did you have any time to go and sit down?

A. Not very much; the only time, we sit down on relief, that is all, a half a hour. They don't allow it there, you have got to work, because there is a lot of work to do, and I can't stand that much.

(Testimony of Fernando S. Forfari.)

Q. And as a result of that you had to quit that job, is that right? A. I told him, yes.

Q. Now, you went back to work, Mr. Forfari, for the first time on April 2d of this year, is that correct? A. That is right. [104]

Q. Now, before you went back to work in this year, which is over five years from the time of this accident, did you work at all during that time?

A. No. I tried to work, but I can't do anything, nobody give me any job.

Q. Did you go to the union to get a job?

A. Oh, yes, and I answered to the paper, too.

Q. What type of a job were you looking for, what type of work did you want?

A. I was looking for some kind of a job to work about four or five hours a day, something like that, you know, because I can't stand to work eight hours or longer.

Q. Now all during this time did you ankle swell on occasions?

A. Oh, yes, if I stand up too long, walk.

Q. Would it be necessary for you to bathe it in hot epsom salts, anything like that?

A. I have to sit down, yes.

Q. During that time did you have any pain in your back? Did you have any pain in your back during that time? A. Oh, yes, I had pain.

Q. At the present time, as you sit there now, do you have any pain in your back?

A. Pain all the time, even pain now.

(Testimony of Fernando S. Forfari.)

Q. Is that the reason why you are sitting there in that strained position? [105] A. Yes.

Q. Now you say that you went back to work for the first time on April the 2d of 1957? A. Yes.

Q. Where did you go back to work?

A. Well, the owner, in the paper, the owner at the place, I know him, he know me, and he put an ad in the paper, he look for a chef, a good man, Italian cook for his place. So in the ad he give his name and the telephone. So I know him, and I said, "I am going to call him up."

So I called him up, and he said, "Come over, if you want to work come over right away."

I said, "I can't come right away, but I can be there in a couple of days, I have to take care of my stuff and come over."

He said, "All right, be sure to come over."

So I went over——

Q. Before you go on, tell me, where is this place located?

A. That is located between, what you call it, Eureka—it is twelve miles from Eureka.

Q. Twelve miles from Eureka?

A. Yes, before you get to Eureka.

Q. And it is in a little town called Fernbridge?

A. Fernbridge, yes, that is the place, yes.

Q. And the place is called The Angelina Inn?

A. Angelina Inn, yes. [106]

Q. And you do the cooking?

A. And Fortuna, it is two miles—about three miles from Fortuna on the highway.

(Testimony of Fernando S. Forfari.)

Q. Now, while you were looking for this job you went and answered this ad, is that correct?

A. Yes.

Q. Now tell me this, what kind of work do you do there? As a chef? Do you work as a chef?

A. Yes, just cook the food.

Q. All right. Now let me ask you this, do you wait on tables?

A. No.

Q. Do you have to do any sweeping or cleaning?

A. No.

Q. Do you have to do any lifting?

A. No.

Q. Do you work only for one meal, that is, the evening meal?

A. One meal, six to ten-thirty; on Saturday about eleven, something like that.

Q. From six o'clock to about 10 o'clock at night, is that right?

A. Yes.

Q. And this establishment, is it principally, Mr. Forfari, a bar and not a restaurant, a tavern business?

A. Yes. [107]

Q. Is that what it is?

A. Yes.

Q. So that in the course of an evening for your meals that you have to prepare for the customers, how many meals do you prepare in the course of one evening?

A. Well, that depends. You see sometimes get five or six people come, have to prepare; but for an hour or so nobody come, because it is a night club, you know, no regular, only transient.

Q. So that in the course of your work in the

(Testimony of Fernando S. Forfari.)

evening there may be a hour or a hour and a half you are not doing anything at all? A. No.

Q. Is it all right with your employer—does he object to the fact that during this time you go and sit down? A. Oh, yes.

Q. You can rest, is that correct?

A. I can rest.

Q. Do you have to do any other kind of work there on this job?

A. No, I don't have to do anything else, only prepare the food, cook them, and the waiter comes and serves them.

Q. You don't wash dishes?

A. No, and they have got a man there to lift everything I need. [108]

Q. So am I right in this, that all you do is cook steaks and vegetables?

A. That is right, steaks, chicken——

Q. Make soup. A. That is right.

Q. And that is all you do?

A. That is all.

Q. In the light of your past experience over the years would you consider this a very light job?

A. Oh, yes.

Q. And despite how light your type of work is, while you are working do you still have pain in your back—— A. Yes.

Q. ——and in your ankle? A. Yes, sir.

Q. And despite that symptom of pain in your ankle and your back you still want to go to work, do you? A. That is right.

(Testimony of Fernando S. Forfari.)

Q. Tell me, Mr. Forfari, how much do you make a week? A. I make \$76.53 a week.

The Court: Is that net or gross?

Mr. Emmons: I think that is net, your Honor.

The Court: What is the gross?

Mr. Emmons: What is your gross, Mr. Forfari?

A. I beg your pardon? [109]

Q. How much is your gross?

A. Gross, what do you mean?

Q. You mentioned a hundred dollars. It is a hundred dollars a week?

A. Yes, about a hundred dollars a week. They have to charge for—they take out the tax and everything else.

Q. So then the net is \$76? A. \$76, yes.

Mr. Emmons: You may cross examine.

Cross Examination

Q. (By Mr. Woodward): Mr. Forfari, do you have any other income? A. I beg your pardon?

Q. Do you have any other income?

A. No, that is all I have, and social security.

Q. Do you receive social security?

A. Yes.

Q. Do you receive an old age pension?

A. Yes.

Q. How much is that?

A. \$64.90 a month, social security.

Q. Do you receive a California old age pension?

A. Oh, yes.

Q. And how much is it?

(Testimony of Fernando S. Forfari.)

A. I got about \$40 a week besides that. [110]

The Court: Now I think you are crossed up here now. That \$40 a week is something that he got other than—I think I can take judicial notice of the fact that if he is making a hundred dollars a week he can't collect any old age pension. He can collect his social security, because after you get, what is it, 72 or 73, you can collect anything you can make in addition to your social security.

Mr. Emmons: That is right.

Q. (By Mr. Woodward): You receive your social security, no question about that. Do you receive any other income at this time other than your wages at the inn?

Mr. Emmons: If your Honor please, I don't think that is material, unless it is by way of employment or work, because otherwise he might receive it from stocks or bonds or anything like that. Not that he has, but I mean it is possible, and I don't think it is material.

The Court: I don't know if I get your point, Mr. Woodward.

Mr. Woodward: Of course, he is contending that he has to work. I don't know if that is of any great materiality.

The Court: I don't think it is of any materiality at all. There are a lot of people down here on the west end of town who contend that they not only don't have to but they are not going to work. That still wouldn't deprive them of their right to compensation if they were injured.

(Testimony of Fernando S. Forfari.)

Mr. Woodward: I don't think that is right at all.

Q. Mr. Forfari, you stated you had some pain in your back? A. Oh, yes.

Q. And you went in 1954 to the doctors in Vallejo to see if they could help that? A. Yes.

Q. And you had an operation and it didn't help it too much, did it?

A. I had an operation in '55 and '56—I had two of them, two operations.

Q. And did the one in '56 assist you?

A. Yes.

Q. Did it make your back feel better?

A. No, there is still pain.

Q. But it is better than it was before you had the operation?

A. Oh yes, better than before, yes.

Q. So that the operation in 1956 helped you some? A. Yes.

Mr. Woodward: I have no further questions.

Redirect Examination

Q. (By Mr. Emmons): Mr. Forfari, when you say it helped you some, is that in regard to the urinary trouble that you had?

A. That is urinary, yes.

Q. It didn't help you as far as your back was concerned?

A. No, for the pain, no, but the urinary, yes. It is all right now. [112]

Mr. Emmons: I have no further questions.

The Court: Anything else?

Mr. Emmons: Yes, your Honor. In the file there is a letter which I directed to the Vallejo General Hospital. They omitted at the last time we were here to forward the correct records. Now, the correct hospital records are now in the custody of the clerk, and I will ask counsel if he will stipulate that they may be introduced at this time, because the custodian failed to deliver them when she was here last time. Otherwise I will have to subpoena her. They were forwarded to the clerk by the hospital.

Mr. Woodward: I have no objection, your Honor, to their coming in.

The Court: Are they in evidence now? Well, let all the records of the Vallejo Hospital be received and marked plaintiff's whatever is next in order. I don't have my original notes.

Mr. Woodward: No objection, your Honor.

The Clerk: No hospital records were here.

The Court: Well, are there any exhibits for the plaintiff?

The Clerk: Plaintiff's exhibits were a contract that was offered in evidence and one insurance policy.

Mr. Emmons: Well, I forgot. It was my understanding that I had introduced them last time.

The Court: All right, let these be received and marked [113] Plaintiff's Exhibit 3.

Mr. Emmons: Thank you.

(The hospital records were marked Plaintiff's Exhibit 3.)

Mr. Woodward: If the Court please, I understand that the plaintiff has nothing further to offer

at this time, and Mr. Forfari is to be examined by Dr. Raymond Wallerius this afternoon on behalf of the government, and Mr. Emmons and I have discussed the matter, and if Dr. Wallerius' report adds nothing of a controversial nature, I believe that after Mr. Emmons has had a chance to inspect it that we could submit the matter then on Dr. Wallerius' report.

Should either of us feel that the actual testimony of Dr. Wallerius is necessary, then may we petition the Court for hearing Dr. Wallerius at that time.

The Court: Well, why not put this matter over to a day certain? I want to get this case out of the way here.

Mr. Emmons: Yes.

The Court: It is beginning to get whiskers on it. This happened in 1951. I know it is of no fault of yours, Mr. Woodward.

Mr. Woodward: Well, I am very happy to proceed as quickly as we can, and I think Dr. Wallerius will get his report in very shortly.

The Court: How about putting it over to a law of motion day on the 30th for further proceedings, with the understanding [114] that you gentlemen will file something in writing at that time. If you want it set down for further proceedings I will give you the earliest date possible, and if you want to have it submitted on the basis of the record, why, you file a stipulation to that effect.

I will continue it over to the law in motion calendar of Monday, September 30th, with the understanding that neither one of you have to be here,

it will all be done in writing, but at least it will keep the court record straight on the matter.

Is that agreeable?

Mr. Woodward: Yes, your Honor.

Mr. Emmons: Perfectly agreeable, your Honor.

The Court: There is one thing: it has been so long since I heard the first part of this case I don't remember whether we explored the question of any compensation that Mr. Forfari may have received.

Mr. Emmons: Yes, there was a witness who testified——

The Court: That is what I thought.

Mr. Emmons: Yes.

The Court: That has been now almost a year ago and I have had quite a few cases since that time.

Mr. Emmons: I can explain that to you: the medical and compensation lien of the State Fund Insurance Company is \$4,085.76. He came and testified and presented his evidence——

The Court: That was my memory, but I wanted to be sure [115] we didn't have any misunderstanding. Since you weren't even here, Mr. Woodward, I know you are in a worst position than I am on it.

Mr. Emmons: I have prepared here a little memorandum concerning damages.

The Court: Why don't we do this: as soon as you have agreed upon which direction you are going to go, as to whether or not you want me to hear Dr. Wallerius, why don't you each submit an informal memorandum to me in a matter of a few days in which you tell me what you really think you are

entitled to. In other words, don't ask for a thousand dollars when you think you are entitled to five hundred because you believe I will cut it in two, but you just tell me — both of you write and tell me what you think is a reasonable amount and itemize it so I will have it before me.

Mr. Emmons: Yes.

The Court: And I will get this matter out of the way at the earliest possible moment. In the first place, time is running out on Mr. Forfari.

Mr. Emmons: Yes, it is not fair that he should be——

The Court: And I just don't like the delay. As I say, nobody here is to blame for it, but it is an unfortunate situation.

All right, then, this matter will be continued over to September 30th at 10:00 a.m. for further proceedings, with the [116] understanding that whatever proceedings we have at that time will be handled in writing, and if you want a further trial I will then set a day certain for further testimony.

Mr. Emmons: For cross examination of the doctor, yes.

The Court: And if there is going to be a further trial you better give us your dates that you can take it up, Mr. Emmons.

Mr. Emmons: Yes, I will do that.

The Court: All right. [117]

Certificate of Reporter Attached.

[Endorsed]: Filed August 29, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
SUPPLEMENTAL RECORD

I, C. W. Calbreath, Clerk, of the District Court of the United States for the Northern District of California, do hereby certify that the accompanying Reporter's Transcript is the original filed in this case, in this Court and constitutes the Supplemental Record on Appeal.

Dated: August 29th, 1958.

[Seal] C. W. CALBREATH,
Clerk,

/s/ By C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 16032. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Fernando S. Forfari, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: May 27, 1958.

Docketed: May 27, 1958.

Supplemental Filed August 30, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16032

UNITED STATES OF AMERICA, Appellant.

vs.

FERNANDO S. FORFARI, Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

To: The Honorable United States Court of Appeals
for the Ninth Circuit.

Appellant, United States of America, in accordance with Rule 17(6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit hereby files Appellant's Statement of Points and Designation of Record in the above-entitled cause, as follows:

1. The District Court erred:

a. In holding that plaintiff was not an employee of the United States.

b. In failing to hold that plaintiff was precluded from maintaining a suit under the Federal Tort Claims Act by virtue of his status as an employee of a non-appropriated fund instrumentality of the United States.

c. In finding that under the law of the State of

California, liability would be imposed upon the United States if it were a private person.

d. In awarding judgment in favor of plaintiff.

2. Appellant hereby designates the following portion of the record to be contained in and printed as the record on appeal:

a. Complaint.

b. Answer.

c. The following portions of the Reporter's Transcript:

(1) Page 52, line 15, through page 55, line 5.

(2) Page 57, line 3, through page 61, line 5.

d. Plaintiff's exhibit #1.

e. Memorandum and order of August 2, 1957.

f. Memorandum and order of December 31, 1957.

g. Findings of fact and conclusions of law.

h. Judgment.

i. Notice of appeal.

j. This designation.

Dated: May 26, 1958.

LLOYD H. BURKE,
United States Attorney,

/s/ By ROBERT E. WOODWARD,
Assistant U. S. Attorney,
Attorneys for Appellant.

Certificate of Service by Mail Attached.

[Endorsed]: Filed May 27, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF
ADDITIONAL RECORD

To the Honorable United States Court of Appeals
for the Ninth Circuit:

Appellee, Fernando S. Forfari, in accordance
with Rule 17(6) of the Rules of Practice of the
United States Court of Appeals for the Ninth Cir-
cuit hereby files his designation of additional parts
of the record which he deems material, as follows:

- (a) The entire Reporter's Transcript;
- (b) All plaintiff's exhibits in evidence;
- (c) All defendant's exhibits in evidence.

Dated: This 3rd day of June, 1958.

ERNEST E. EMMONS, JR. and
THOMAS M. MULVIHILL,

/s/ By ERNEST E. EMMONS, JR.,
Attorneys for Appellee.

[Endorsed]: Filed June 3, 1958. Paul P.
O'Brien, Clerk.

